Office-Supreme Court, U.S.
FILED
MAY 17 1983
ALEXANDER L. STEVAS,
CLERK

82-1861

No.

IN THE

Supreme Court of the United States

October Term, 1982

V. LOUISE McCARREN, ROSALYN L. HUNNEMAN, AND SAMUEL S. BLOOMBERG, IN THEIR OFFICIAL CAPACITIES AS MEMBERS OF THE STATE OF VERMONT PUBLIC SERVICE BOARD, AND THE TOWN OF CAVENDISH, VERMONT

Petitioners,

v.

TOWN OF SPRINGFIELD, VERMONT AND VERMONT PUBLIC POWER SUPPLY AUTHORITY

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

When the State of Vermont Public Service Board (the "Board"), a public utility regulatory agency given all the powers of a court of record, has issued a declaratory judgment ruling that it has jurisdiction to require a certificate of public good under Vermont law for a hydroelectric generating facility proposed to be constructed by the Town of Springfield and the Vermont Public Power Supply Authority (collectively, "Springfield"):

Jurisdictional Questions

1. Does the Anti-Injunction Act, 28 U.S.C. §2283, prohibit the district court from issuing a declaratory judgment overturning the Board's ruling and holding the Vermont law requiring a certificate of public good pre-empted and invalid?

2. Is the ruling of the Board *res judicata*, or may Springfield, which unsuccessfully argued before the Board that Board jurisdiction was totally pre-empted by the licensing requirements of the Federal Power Act, relitigate the issue a second time in a collateral attack in federal court?

3. Does Springfield's declaratory complaint, which sought to overturn the Board's ruling for the sole purpose of establishing a defense to enforcement of that ruling in state court, establish federal question jurisdiction?

4. Should the district court have abstained under principles of comity and federalism from exercising jurisdiction and substituting itself for the state's appellate courts?

Merits

1. Can Vermont's law requiring Board review and the issuance of a certificate of public good for Springfield's proposed hydroelectric project be accommodated with the licensing authority of the Federal Energy Regulatory Commission ("FERC") under the Federal Power Act?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Petitioners, members of the State of Vermont Public Service Board, and the Town of Cavendish, Vermont respectfully pray for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on February 16, 1983.

OPINIONS BELOW

The order of the Court of Appeals for the Second Circuit appears in the Appendix at 6a. The opinion of the District Court for the District of Vermont, from which appeal was taken, is reported at 549 F. Supp. 1134 (D. Vt. 1982), and appears in the Appendix at 8a. The declaratory judgment of the Board in *Petition of the Town of Cavendish for Declaratory Ruling*, PSB Docket 4444, which the district court declared null and void, appears in the Appendix at 57a.

JURISDICTION

The order of the Court of Appeals for the Second Circuit is dated and was entered on February 16, 1983. This petition for certiorari was filed within 90 days after that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

This petition raises issues which require a construction of the Supremacy Clause of the United States Constitution, Art. VI, cl. 2, and the Federal Power Act, in particular 16 U.S.C. §§802, 821, as it relates to the validity of Vermont Statutes Annotated, Title 30, Section 248. This petition also raises questions of interpretation of the Anti-Injunction Act, 28 U.S.C. §2283; the Declaratory Judgment Act, 28 U.S.C. §2201; the Judicial Code, 28 U.S.C. §1331, 1337; and FERC's regulation issued under the Federal Power Act at 18 C.F.R. §4.41 (1978). Reference is also made to the Federal Reclamation Act of 1902, 43 U.S.C. §383. These authorities are set forth in the Appendix.

STATEMENT OF THE CASE

This case is about federalism. The threshold questions

address whether a federal court may substitute itself for a state appellate court and overturn a declaratory judgment ruling by a state administrative agency acting in its judicial capacity. The further question, reached only if federal court jurisdiction was properly invoked, is whether there can be an accommodation between the state's interests, in assuring that proposed hydroelectric generating facilities in Vermont satisfy local regulatory concerns, and FERC's federal licensing authority.

Springfield proposes to construct and operate a hydroelectric generating facility near Springfield, Vermont on the Black River, a navigable river. On June 5, 1978, Springfield applied to FERC for a license for the project under the requirements of the Federal Power Act. FERC has not yet ruled on the application.

On January 25, 1980, the Town of Cavendish, Vermont petitioned the Board for a declaratory judgment on whether Springfield's proposed project was subject to Board review under Vermont Statutes Annotated, Title 30, Section 248. Section 248 requires utilities to obtain a certificate of public good prior to commencing construction of a generating facility in Vermont. Prior to issuing the certificate, the Board considers such local factors as the facility's impact on the orderly development of the region; whether it is needed to supply electrical service; and its effect on aesthetics, historic sites, air and water purity, the natural environment, and public health and safety.

Springfield appeared as respondent before the Board and argued that FERC's licensing jurisdiction pre-empted the Board from exercising any review whatsoever of the Black River Project. After briefing and oral argument, on April 8, 1982, the Board ruled that it had jurisdiction under §248 and forbade Springfield from commencing site preparation until Springfield obtained a certificate of public good.

Although Vermont law provides for direct review of the Board's declaratory orders by the Vermont Supreme Court, Springfield did not appeal the Board's ruling. Instead Springfield sought a reversal of the Board's ruling in federal district court, and on May 4, 1982, it filed its complaint seeking a declaratory judgment under 28 U.S.C. §§2201-2202 that the Board's ruling was null and void on the same preemptive grounds argued before the Board. Federal court jurisdiction was asserted under 28 U.S.C. §§1331 and 1337.

The Town of Cavendish moved to intervene on behalf of the Board in the district court action, and that motion was granted. On October 15, 1982, the district court filed its decision granting Springfield summary judgment and the declaratory relief sought. The Petitioners timely appealed to the United States Court of Appeals for the Second Circuit. On February 16, 1983, the court of appeals affirmed the judgment of the district court. This Petition for Writ of Certiorari was timely filed on May 17, 1983.

REASONS FOR GRANTING THE WRIT

The applicability of the Anti-Injunction Act, the principles of *res judicata*, the grounds for federal question jurisdiction, and principles of comity, as they relate to this case, present complicated and extraordinarily important questions of federalism. If allowed to stand, the decisions below will improperly expand the jurisdiction of the federal courts to include the resolution of controversies which the state courts are fully authorized and competent to decide. The Second Circuit, in authorizing federal jurisdiction, which was in essence the exercise of appellate review of a state judicial decision, has so far departed from the accepted and usual course of judicial proceedings, and has so far sanctioned a departure by the lower court, as to call for an exercise of this Court's power of supervision.

I. This Court Has Never Decided Whether the Anti-Injunction Act Prohibits Federal Interference in the Judicial Proceedings of State Administrative Agencies.

The Anti-Injunction Act, 28 U.S.C. §2283, prohibits the granting of a federal injunction which "stays proceeding in a State Court". This Court has never decided whether the Anti-Injunction Act extends to the judicial proceedings of state administrative agencies. Decision on the question was expressly reserved in *Gibson v. Berryhill*, 411 U.S. 564, 573, n.12 (1973), where this Court stated:

> "[t]he District Court held §2283 inapplicable in the present case because the plaintiffs sought an injunction against a state administrative body and not a state court. Whether this distinction is tenable in all circumstances — even where the administrative proceeding is adjudicatory or quasi-judicial in character — we need not decide here since the present action was brought under 42 U.S.C. §1983."

The Board is given, by Vermont law, all the powers of a court of record, including appropriate enforcement powers.[1] In issuing its declaratory judgment, the Board was exercising a purely judicial function. Thus, this case squarely presents the undecided question of whether the judicial functions of state administrative agencies are protected from federal interference.

The question as it is presented here is particularly important and fundamental because the courts below, in over-

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1 Under 30 V.S.A. §9, the Board "shall have the powers of a court of record, both at law and in equity, in the determination and adjudication of all matters over which it is given jurisdiction. It may render judgments, make orders and decrees, and enforce the same by any suitable process issuable by courts of law and equity in this state."

turning the Board's ruling, in effect, substituted themselves for Vermont's appellate courts. Yet it is a fundamental precept that the lower federal courts were not given the power to sit in direct review of state judicial determinations. *Atlantic Coast Line R. Co. v. Brotherhood of Locomotive Engineers*, 398 U.S. 281, 286 (1970). Indeed, the prevention of such appellate review was a primary purpose of the Anti-Injunction Act. *Vendo Co. v. Lektro-Vend Corp.*, Stevens, J. dissenting, 433 U.S. 623, 658 (1977).

This case also raises the question whether the courts below misconstrued the principles, laid down by Justice Holmes in *Prentis v. Atlantic Coast Line*, 211 U.S. 210 (1908), which have been the basis of Anti-Injunction Act analysis for the past 70 years. Under *Prentis*, in determining whether the Anti-Injunction Act applies, function rather than form controls. *Id.* at 226. Whether a state decision-making tribunal is a "court" within the meaning of the Act depends on the nature of the particular proceedings: proceedings which are judicial in character are protected from federal interference. *Id.*

At issue in *Prentis* was whether a predecessor of the Anti-Injunction Act barred a federal injunction against enforcement of a railroad rate order issued by the Virginia State Corporation Commission, a public utility regulatory agency like the Board. While the decision held that the Act did not apply, that holding was based on the determination that the Commission, in establishing rates, was exercising a legislative, rather than a judicial, power. If the Commission had been exercising a judicial power, under Justice Holmes' analysis, the Commission would have been protected by the Act.

The converse of Justice Holmes' analysis is that the Anti-Injunction Act does not apply when a state court exercises administrative functions. *Roudebush v. Hartke*,

405 U.S. 15 (1972); *Feldman v. Gardner*, 661 F.2d 1295 (D.C. Cir. 1981), *cert. denied*, 102 S. Ct. 3483 (1982). The courts below, in suggesting that *Prentis'* functional rule is to be applied only in those circumstances, ignore that the rule was formulated in a case involving proceedings before a state public utility regulatory agency for the purpose of determining whether the Act protected the agency's proceedings.

While *Prentis* hinges the applicability of the Act on whether the state proceedings are judicial in character, the courts below hinge the Act's applicability on whether the state proceedings are *in rem* or *in personam*. The determination that the Board's *in rem* proceedings are protected by the Act, but its *in personam* proceedings, including the declaratory judgment proceeding at issue here, are unprotected is untenable and unsupported by judicial precedent.

Furthermore, the assertion in the decisions below that the Board cannot be a "court", at least for *in personam* actions, because a separate proceeding before the Vermont Supreme Court may be required under Vermont law to enforce the Board's ruling, is precluded by *Hill v. Martin*, 296 U.S. 393 (1935). *Hill v. Martin* held that any further proceedings required to compel satisfaction of a state order does not defeat the applicability of the Act. *Id.* at 401, 402.

This Court has ruled that the Anti-Injunction Act is strictly construed against federal interference. *Atlantic Coast Line R. Co. v. Brotherhood of Locomotive Engineers*, 398 U.S. 281 (1970). It has ruled that the Act imposes an absolute prohibition which applies to the results of completed court proceedings. *Id.* It has ruled that questions of federal pre-emption do not create an exception to the Act. *Id.* And this Court has ruled that while the Act refers only to injunctive relief, it cannot be circumvented by seeking a

declaratory judgment which would have the same effect as an injunction. *Samuels v. Mackell*, 401 U.S. 66 (1971).

In contrast, the courts below ruled that the Anti-Injunction Act does not apply to the proceedings of a state administrative agency which possesses, and was exercising, judicial powers, notwithstanding that the federal interference in the state proceeding was particularly pronounced because the federal courts, in effect, substituted themselves for Vermont's appellate courts. If left uncorrected, the decisions below will result in unnecessary and potentially disruptive federal declaratory interference in the basic judicial functions of state administrative agencies.

II. This Court Has Never Decided Whether Res Judicata Applies to a Fully Litigated Jurisdictional Claim Predicated on a Claim of Pre-emption, Which at Most Falls into the Penumbral Region Between State and Federal Authority.

Springfield extensively argued against the Board's §248 jurisdiction in the declaratory judgment proceeding before the Board. Springfield could have obtained direct review of the Board's adverse determination from the Vermont Supreme Court. Instead Springfield sought review in a collateral attack in federal district court.

It is established law that *res judicata* applies to questions or jurisdiction, just as to other issues, if the jurisdictional question was fully litigated in the original forum. *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxetes de Guinea*, 102 S. Ct. 2099 (1982); *Durfee v. Duke*, 375 U.S. 106 (1963). It is also established that *res judicata* applies to judicial functions of administrative agencies where the disputed issues were litigated. *United States v. Utah Construction Co.*, 384 U.S. 394 (1966). But this Court has not de-

cided whether a fully litigated jurisdictional claim before a state quasi-judicial agency can be relitigated merely because the jurisdictional defense was based on pre-emption in the penumbral region of state and federal regulatory authority.

In *Durfee v. Duke*, 375 U.S. 106, 114 (1963), this Court cited *Kalb v. Feuerstein* for the proposition that "[d]octrines of federal pre-emption . . *may in some contexts* be controlling." (emphasis added.) But the *Durfee* decision in a footnote also implies that had the jurisdictional issue been litigated in the first forum, *res judicata* would apply. *Id.* at n.12. In *Kalb v. Feuerstein*, 308 U.S. 433 (1940), *res judicata* was not applied to a claim of federal pre-emption for two reasons: first, the issue had not been litigated and second, the pre-emption was expressly containd in the federal statute. In this case, the issue of federal pre-emption was extensively litigated before the Board, and pre-emption is not claimed under a specific statutory provision. Thus, the question of *res judicata* presented here raises important legal issues which have not been decided by this Court.

The states and their officials are bound by the Constitution and the federal statutory law. Yet the courts below failed to apply *res judicata* based solely on the fact that the Board is an administrative agency and its ruling rests on a question of federal pre-emption. The courts' decisions impeach the competence and procedures of Vermont's judicial tribunals. The intervention of this Court is required to decide whether the refusal to apply the rule of finality of jurisdictional determinations improperly narrows the doctrine of *res judicata*.

III. The Court of Appeals' Decision Upholding Federal Question Jurisdiction Is in Conflict with Decisions of Other Courts of Appeals.

Federal jurisdiction under 28 U.S.C. §§1331, 1337 re-

quires that a right or immunity created by the Constitution or the laws of the United States be an essential element of the plaintiff's claim. *Gully v. First National Bank in Meridian*, 299 U.S. 109 (1936); *Louisville & Nashville R. Co. v. Mottley*, 211 U.S. 149 (1908). It is not enough that a federal question appears in the complaint as an anticipation or reply to a probable defense. *Phillips Petroleum Co. v. Texaco*, 415 U.S. 125 (1974).

Springfield's complaint alleged that Board jurisdiction is pre-empted by federal law. But the federal claim is asserted only as a defense to the Board's enforcement of its ruling. The actual controversy is the application of the state statute.

The Second Circuit's decision that federal pre-emption, raised as a defense to a threatened state action, supports federal jurisdiction is in conflict with the principles enunciated by this Court in *Public Service Commission v. Wycoff*, 344 U.S. 237 (1952). It is also in conflict with decisions by the Third, Sixth, Seventh, Eighth, Ninth and Tenth Circuits which have followed *Wycoff*. Because it is an extraordinarily important jurisdictional holding, it should be reviewed by this Court.

The Declaratory Judgment Act is procedural only. *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667 (1957). To permit a declaratory plaintiff to invoke federal jurisdiction to assert the validity of his federal defense has been held to result in an unintended extension of federal jurisdiction. *Public Service Commission v. Wycoff*, 344 U.S. 237 (1952). In *Wycoff* this court observed:

> "[i]n this case, as in many actions for declaratory judgment, the realistic position of the parties is reversed. The plaintiff is seeking to establish a defense against a cause of action which the declaratory defendant may assert in the Utah courts. Respondent here

has sought to ward off possible action of the petitioners by seeking a declaratory judgment to the effect that he will have a good defense when and if that cause of action is asserted. Where the complaint in an action for declaratory judgment seeks in essence to assert a defense to an impending or threatened state court action, it is the character of the threatened action, and not of the defense, which will determine whether there is federal-question jurisdiction in the District Court. If the cause of action, which the declaratory defendant threatens to assert, does not itself involve a claim under federal law, it is doubtful if a federal court may entertain an action for a declaratory judgment establishing a defense to that claim. This is dubious even though the declaratory complaint sets forth a claim of federal right, if that right is in reality in the nature of a defense to a threatened cause of action. Federal courts will not seize litigations from state courts merely because one, normally a defendant, goes to federal court to begin his federal-law defense before the state court begins the case under state law." *Id.* at 248.

The majority of the federal courts have followed *Wycoff* and held that federal jurisdiction is lacking where a declaratory suit seeks to establish a defense of federal pre-emption to a threatened state action. *Allegheny Airlines, Inc. v. Pennsylvania Public Utility Commission*, 465 F.2d 237 (3d Cir. 1972), *cert. denied*, 410 U.S. 943 (1973); *Exxon Corp. v. Hunt*, 683 F.2d 69 (3d Cir. 1982); *Michigan Savings and Loan League v. Francis*, 683 F.2d 957 (6th Cir. 1982); *First Federal Savings & Loan Association v. District Bond & Mortgage Investment Company*, 687 F.2d 143 (6th Cir. 1982); *Home Federal Savings and Loan Association v. Insurance Department of Iowa*, 571 F.2d 423 (8th Cir. 1978); *First Federal Savings and Loan Association v. Anderson*,

681 F.2d 528 (9th Cir. 1982); *Lawrence County v. State of South Dakota*, 668 F.2d 27 (8th Cir. 1982); *United Air Lines v. Division of Industrial Safety*, 633 F.2d 814 (9th Cir. 1980), *cert. denied*, 454 U.S. 944 (1981); *Madsen v. Prudential Federal Savings & Loan Association*, 635 F.2d 797 (10th Cir. 1980).

Other Courts have attempted, not always convincingly, to distinguish *Wycoff* on the facts of the case. *First Federal Savings & Loan Association v. Greenwald*, 591 F.2d 417 (1st Cir. 1979); *Braniff International, Inc. v. Florida Public Service Commission*, 576 F.2d 1100 (5th Cir. 1978); *Conference of Federal Savings and Loan Associations v. Stein*, 604 F.2d 1256 (9th Cir. 1979), *aff'd mem.*, 445 U.S. 921 (1980); *Rath Packing Co. v. Becker*, 530 F.2d 1295 (9th Cir. 1975), *aff'd sub nom. Jones v. Rath Packing Co.*, 430 U.S. 519 (1977). One court has expressly rejected *Wycoff*. *People of State of Ill. v. General Electric Co.*, 683 F.2d 206 (7th Cir. 1982).

The question posed by *Wycoff*, whether federal jurisdiction exists where a party seeks a declaration that he is immune, by virtue of federal law, from a non-federal claim, has troubled the commentators as well as the courts. Professor Wright sees two possible approaches:

> "[t]he complaint in a declaratory judgment action may be judged on its own merits; if it reveals a federal claim, then jurisdiction will exist. But this, as will be seen, would permit some cases to be brought in federal court that could not be so brought absent the Declaratory Judgment Act. The alternative is to say that the declaratory action may be entertained in federal court only if the coercive action that would have been necessary, absent declaratory judgment procedure, might have been so brought." Wright, *Federal Courts*, §18, p. 100 (4th ed.)

In Wright's opinion, when the issue is finally settled the latter, narrow test will be the law. *Id.* at 102.

In contrast, the Second Circuit in *Stone & Webster Engineering Corp. v. Ilsley*, 690 F.2d 323 (2d Cir. 1982), adopted the position taken in a Columbia Law Review Note that "federal courts have jurisdiction to entertain any declaratory suit that alleges a federal claim that could be asserted in an action for injunctive relief, regardless of whether an injunction would actually have been granted". Note, *Federal Jurisdiction over Declaratory Suits Challenging State Action*, 79 Colum. L. Rev. 983, 1000 (1979). However, that test too has problems. Since the practical effect of declaratory and injunctive relief is virtually identical, the test establishes a formalistic means of circumventing the jurisdictional limitations of the Declaratory Judgment Act. Furthermore, such an extension of federal court jurisdiction cannot be reconciled with *Wycoff*'s and Professor Wright's view that the linchpin of federal question jurisdiction is whether the threatened state action could have been brought in federal court.

Where, as here, an attempt is made to use the federal court for appellate review of a state tribunal's decision, the potential for interference with state court litigation condemned in *Wycoff* is particularly pronounced. As the court said in *Clark v. Memolo*, 174 F.2d 978, 981 (D. C. Cir. 1949): "[t]he primary purpose of the [Declaratory Judgment A]ct [is] to have a declaration of rights not theretofore determined, and not to determine whether rights theretofore adjudicated, have been properly adjudicated."

The difficult and complicated jurisdictional questions raised by Springfield's declaratory challenge to the validity of the Board's ruling require explication by this Court. A decision by this Court will provide for uniformity and

eliminate the confusion engendered by the Court of Appeals' differing applications of *Wycoff*.

IV. The District Court's Failure to Abstain from Exercising Jurisdiction, Which Was Upheld by the Court of Appeals, Raises Important Issues of Comity and Federalism Which Should be Decided by this Court.

Springfield, without resorting to its available and fully adequate state remedies, asked the district court to overturn the Board's declaratory ruling. Whether the district court was correct in exercising its jurisdiction and granting that request presents important questions of comity and federalism between state and federal courts.

In *Younger v. Harris*, 401 U.S. 37, 44 (1971), this Court described the notion of comity as including:

> "... a proper respect for state functions, a recognition of the fact that the country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways".

When important state interests are involved, *Younger* abstention is applied to state administrative proceedings which are judicial in character. *Middlesex County Ethics Committee v. Garden State Bar Association*, 102 S. Ct. 2515 (1982). The state interests present here warrant federal abstention.

Vermont's interest in reviewing proposed generating facilities and requiring a certificate of public good is both a traditional and a substantial state interest. Section 248 review is a major component of Vermont's efforts to plan comprehensively for its future energy needs. The criteria reviewed balance economic objectives against other local

interests and goals vital to assuring the protection of the public interest.

"Need for new power facilities [and] their economic feasibility . . . are areas that have been characteristically governed by the States." *Pacific Gas and Electric Co. v. State Energy Resources Conservation & Development Commission,* 51 U.S.L.W. 4449 (U. S. April 20, 1983). State authority over new power facilities has been implemented traditionally by the requirement of a certificate of public convenience and necessity which is the same as Vermont's certificate of public good. *See,* Jones, *Origins of the Certificate of Public Convenience and Necessity: Developments in the States, 1870-1920,* 79 Colum. L. Rev. 426, 454-55 (1979); American Bar Association, *The Need for Power and Choice of Technologies: State Decisions on Electric Power Facilities* (1981).

The courts below found that an important state interest was not present because the Board's ruling came about upon an application by the Town of Cavendish. But irrespective of how this controversy was initiated, the Board's own ruling is under attack and the members of the Board in their official capacities are defending that ruling.

This Court has repeatedly stated that the federal courts should abstain from exercising jurisdiction where there is opportunity to raise and have timely decided by a competent state tribunal the federal issues involved. *Middlesex County Ethics Committee v. Garden State Bar Association,* 102 S. Ct. 2515 (1982); *Moore v. Sims,* 442 U.S. 415, 430 (1979); *Gibson v. Berryhill,* 411 U.S. 564, 577 (1973). Here, Springfield litigated the jurisdictional issue before the Board, and Vermont law authorized Springfield to appeal the Board's ruling directly to the Vermont Supreme Court. That court had full power and responsibility to decide Springfield's federal claims.

Nonetheless, the courts below failed to abstain. Jurisdiction was exercised because Springfield's attack on the Board's ruling was predicated on a claim of federal pre-emption.[2]

But as this Court noted in *Amalgamated Clothing Workers v. Richman Bros.*, 348 U.S. 511, 519 (1955), the adequacy of state review is not impaired because the issue of federal law or constitutional rights is the sometimes subtle line of demarcation between federal and state jurisdiction. *See also, Middlesex County Ethics Committee v. Garden State Bar Association*, 102 S. Ct. 2515 (1982). By failing to afford Vermont's tribunals the opportunity to address an attack on state authority based on federal law, the decisions below raise important questions of federalism which should be settled by this Court. The questions are

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2 The district court relies on *Public Utilities Commission v. United Fuel Gas Co.*, 317 U.S. 456 (1943), and *Public Utilities Commission of California v. United States*, 355 U.S. 534 (1958), for the proposition that where a question of federal statuatory pre-emption is involved, principles of comity do not apply and state review should give way to the federal courts.

Public Utilities Commissioner v. United Fuel Gas Co., 317 U.S. 456 (1943), was a case of singular facts, including the inordinately long period the case had been in federal court, and the fact that the defendant would have had to incur substantial expense to comply with the state order, or if it did not comply, risk incurring heavy fines. The holding there cannot be extended to apply to the facts presented here.

Public Utilities Commission of California v. United States, 355 U.S. 534 (1958), is equally inapplicable. There, the Court held that the United States need not pursue its remedies before the California Commission because a federal constitutional claim was made which the administrative agency did not have the power to entertain. No such disability exists with respect to the Board's interpretation of the Federal Power Act as it applies to the Board's jurisdiction under 30 V.S.A. §248 to review the Black River hydroelectric project.

particularly important in view of this Court's observations in *Huffman v. Pursue, Ltd.* 420 U.S. 592, 608 (1975):

> "[v]irtually all of the evils at which *Younger* is directed would inhere in federal intervention prior to completion of state appellate proceedings, just as surely as they would if such intervention occurred at or before trial. Intervention at the later stage is if anything more highly duplicative, since an entire trial has already taken place, and it is also a direct aspersion on the capabilities and good faith of state appellate courts."

The Court further observed:

> "[i]n short, we do not believe that a State's judicial system would be fairly accorded the opportunity to resolve federal issues arising in its courts if a federal district court were permitted to substitute itself for the State's appellate courts. We therefore hold that *Younger* standards must be met to justify federal intervention in a state judicial proceeding as to which a losing litigant has not exhausted his state appellate remedies." *Id.* at 609.

V. The Decisions Below, Holding FERC's Licensing Authority Exclusive of all State Review Whatsoever, Improperly Infringe the States' Rights, Misconstrue Decisions of this Court and Decide an Important Question Which Has Not Been Decided by this Court.

The courts below denied the Board any authority whatsoever to review and require a certificate of public good for the Black River hydroelectric project and held that exclusive jurisdiction over every conceivable matter pertaining to that project rests with FERC. The courts so held, notwithstanding, that FERC has expressed no opposition to the Board's authority, and FERC's regulations, as discussed be-

low, specifically recognize such authority. And the courts so held in spite of the fact that Springfield has not been subjected to any conflicting state and federal requirements; neither the Board nor FERC has yet acted.

This case raises the question whether the decisions below improperly upset the delicate balance between state and federal authority. The question is particularly fundamental because the courts below invalidated what is only an anticipated exercise of state jurisdiction which cannot be shown to be inconsistent with either the letter or intent of federal law or regulation.

Certificates of public convenience and necessity are a traditional and essential component of most states' regulation of public utilities; thirty-eight states require prior certification of new power plants. American Bar Association, *The Need for Power and the Choice of Technologies: State Decisions on Electric Power Facilities*, 5 (1981). Many states also regulate other aspects of utility operations, such as proposed financings, which also touch on projects subject to FERC's licensing authority. *Id.* at 8. If left uncorrected, the holdings of the courts below threaten all such regulatory schemes and effect a drastic redistribution of state and federal authority.

Review by this Court is also needed because the decisions below misconstrued *California v. United States*, 438 U.S. 645 (1978), which sustained California's jurisdiction over a federal reclamation project under §8 of the Federal Reclamation Act, a provision virtually identical to §27 of the Federal Power Act. Without guidance from this Court the principles articulated in *California* will be improperly circumscribed.

Furthermore, the decisions below rely on *First Iowa Hydro-Electric Coop. v. Federal Power Commission*, 328 U.S. 152 (1946), for a holding it did not make. Whether the

holding in *First Iowa* should be extended to preclude state jurisdiction without regard to any conflict with FERC's jurisdiction is a question of extreme importance to the states.

Basic to any consideration under the Supremacy Clause is "the assumption that the historic police powers of the States were not to be superseded by the Federal Act, unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fee Elevator Service Corp.*, 331 U.S. 218, 230 (1947); *Maryland v. Louisiana*, 101 S. Ct. 2114, 2129 (1982). Federal regulation of a field does not in and of itself manifest congressional intent to pre-empt state regulatory power. *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963); *Merrill Lynch, Pierce, Fenner & Smith v. Ware*, 414 U.S. 177, 139 (1973). Rather, pre-emption occurs only where either "the nature of the regulated subject matter permits no other conclusion, or . . . [where] Congress has unmistakably so ordained". *Chicago and N.W. Transportation v. Kalo Brick & Tile*, 450 U.S. 311, 317 (1981); *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963).

Congress did not, in the Federal Power Act, unmistakably ordain that federal jurisdiction was exclusive. In fact, Congress explicity recognized and "ordained" the concurrent jurisdiction of the states. Section 9(b) of the Federal Power Act, 16 U.S.C. §802, requires applicants for a federal license to submit evidence that they have complied with state laws with respect to the "use of water for power purposes and with respect to the right to engage in the business of developing, transmitting, and distributing power; . . .". Section 27 of the Federal Power Act preserves the states' jurisdiction over the control, appropriation, use and distribution of water.

The regulations issued under the provisions of Sections

9(b) and 27 are even more explicit, requiring an applicant for a federal license to submit copies of:

> " . . . special hydroelectric, waterpower, or irrigation laws of the State or States involved [which] pertain to the construction of the applicant's project . . ." 18 C.F. R. §4.41 (1978).

An applicant is further required to submit:

> "[e]vidence that the applicant has complied with the requirements of the laws of the State or States within which the project is to be located with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting, and distributing power, and in any other business, necessary to effect the purposes of the license applied for, including a *certificate of convenience and necessity, if required.* This evidence shall be accompanied by a statement of the steps that have been taken and the steps that remain to be taken to acquire franchise or other rights from States, counties and municipalities before the project can be completed and put into operation." *Id.* (emphasis added).

As discussed above, a certificate of public good issued under §248 is a "certificate of convenience and necessity". It is a general rule that the construction given by a federal agency of the Act it is charged with administering must be given considerable weight. *California v. United States,* 438 U.S. 645, 676, n. 30 (1978). Ignoring that rule, the courts below construed the Federal Power Act in direct conflict with FERC's own regulations.

Review by this Court is required to decide whether the decisions below improperly subvert the regulatory scheme adopted by FERC and create an infringment of the rights of the states which Congress never considered. It is also

required to decide whether the holding in *First Iowa Hydro-Electric Coop. v. Federal Power Commission*, 328 U.S. 152 (1946), was improperly extended.

The courts below relied on *First Iowa* for their holding that the licensing jurisdiction of FERC is exclusive of all authority of the Board to issue a certificate of public good under §248. But neither *First Iowa*, nor any other decision of this Court, has held that FERC's licensing jurisdiction under the Federal Power Act is exclusive of all review responsibilities whatsoever of the states. One of the two holdings in *First Iowa* was that Iowa's statute was void because it directly conflicted with licensing under the Federal Power Act. *Id.* at 166, 167. The Court held that "[t]he detailed provisions of the Act providing for the federal plan of regulation leave no room or need for *conflicating* state controls." *Id.* at 181 (emphasis added). The second holding was that the Federal Power Commission did not have to defer to state permit and licensing requirements prior to issuing its license. *Id.* at 170.

In contrast to *First Iowa*, the issue here is not whether state law can prevent the issuance of a federal license; the Board is not arguing that FERC is precluded from issuing its license absent Board certification under §248. The only issue is whether Board jurisdiction under §248 is totally precluded by FERC's licensing jurisdiction where there is no showing that the exercise of that jurisdiction will conflict with or impair FERC's licensing authority. This Court has not decided that issue.[3]

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[3] Language in *Federal Power Commission v. Oregon*, 349 U.S. 435, 450, n. 24 (1955), supports the conclusion that state laws which are not in conflict with the Federal Power Act are not superseded. There the Court stated: "[w]hile we hold that such approval [by the Oregon Hydroelectric Commission] is not necessary [to federal licensure], there is no reason why the company should not seek state as well as federal approval of the project". *Id.* The state approval sanctioned in *Oregon* would be nonsensical if all jurisdiction rested in the federal government.

The extension by the courts below of the holding in *First Iowa* to preclude all state jurisdiction to issue a certificate of public good conflicts with the principles set forth in *California v. United States*, 438 U.S. 645 (1978). It is of fundamental importance to the states that this Court define the contours of the *California* decision as it relates to *First Iowa* and the regulatory authority of the states under the provisions of the Federal Power Act.

In *California*, this Court found that §8 of the Federal Reclamation Act reserved to the states the power to impose any condition on the "control, appropriation, use or distribution of water" through a federal reclamation project that is not inconsistent with clear congressional directives. *Id.* at 672, 674-75. Because §27 of the Federal Power Act is virtually identical to §8 of the Federal Reclamation Act and Vermont's §248 is substantially similar to the state law at issue in *California*, a like result should be required here.

Both the statute at issue in *California* and §248 authorize the issuance of a state permit based on a determination that it will serve the "public interest" or "public good". Both set up a general system of state regulatory review and control of the entire project. Both states include in their determination such local concerns as water purity or quality, the environment, aesthetics and recreation. Many of the conditions imposed by the California State Water Resources Control Board on the operation of the New Melones Dam and the state concerns they illustrate, are precisely the kind of conditions and concerns contemplated by §248. *See, California v. United States*, 438 U.S. 645, 652, n. 7, 8 (1978).

If §8 of the Federal Reclamation Act of 1902 authorizes the issuance of a permit by the California State Water Resources Control Board, then §27 of the Federal Power Act, which is virtually identical to §8, authorizes the issu-

ance of a certificate of public good by the Vermont Public Service Board. If California's statute was construed as relating to the "control, appropriation, use, or distribution of water", saved from pre-emption under §8, the substantially similar Vermont statute requires the same construction.

This Court has specifically found that the language contained in §27 and §8 saving from pre-emption state laws relating to the "control, appropriation, use, or distribution of water" has the same meaning as it appears in all of the federal Acts. *First Iowa Hydro-Electric Coop. v. Federal Power Commission*, 328 U.S. 152, 177 n. 20 (1946).[4] The decision in *First Iowa* stated that "the use, in §27 of the Federal Power Act, of language having a limited meaning in relation to proprietary rights under the reclamation law . . . carries that established meaning of the language into the Federal Power Act in the absence of anything in the Act calling for a different interpretation of the language." *Id.* Notwithstanding that admonition, the courts below found that §8 and §27 must be given radically different meanings and that §27 must have the meaning discarded in *California v. United States.*

Not only do the decisions below directly conflict with this Court's statement that §27 and §8 have identical meanings, they also ignore that, historically, this Court had interpreted the two sections in exactly the same way. In numerous cases prior to *California*, both sections had been construed extremely narrowly, saving from federal supersedure only state laws relating to proprietary rights. The first case to so interpret §27 was *First Iowa Hydro-Electric Coop. v. Federal Power Commission*, 328 U.S. 152, 176

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4 Similar language had been incorporated by Congress in §14 of the Ferris Bill of 1914 (H.R. No. 16673, 63d Cong., 2d Sess.) and in §13 of the Ferris Public Lands Bill of 1916 (H.R. No. 408, 64th Cong., 1st Sess.).

(1946), where this Court observed that §27 of the Federal Power Act referred primarily, if not exclusively, to proprietary rights for "[t]here is nothing in the paragraph to suggest a broader scope." The same interpretation of §27 was applied in the decisions in *Federal Power Commission v. Oregon*, 349 U.S. 435, 445 (1955), and *Federal Power Commission v. Niagara Mohawk Power Corp.*, 347 U.S. 239 (1954).

This Court had given the identical interpretation to §8 of the Federal Reclamation Act. The decision in *Ivanhoe Irrigation District v. McCracken*, 357 U.S. 275, 291-92 (1958), stated:

> "[a]s we read §8, it merely requires the United States to comply with state law when, in the construction and operation of a reclamation project, it becomes necessary for it to acquire water rights or vested interests therein. . . . We read nothing in §8 that compels the United States to deliver water on conditions imposed by the State."

That interpretation of §8 was reaffirmed by the Court in *City of Fresno v. California*, 372 U.S. 627 (1963), and in *Arizona v. California*, 373 U.S. 546 (1963).

Thus, prior to *California v. United States* this Court had consistently followed the interpretation that §8 and §27 related only to proprietary rights. In contrast, *California* held that, under §8, reclamation projects were subject to the dual control of California and the Federal Bureau of Reclamation, and California was authorized to require a state permit with twenty five conditions attached.

That §27 and §8 should be given radically different meanings from one another, after almost 40 years of having been interpreted in the same manner, cannot be justified merely by the fact that the two sections are contained in

different Acts of Congress. While the two Acts clearly have very different purposes and histories, those differences do not suggest, much less require, the attribution of totally different meanings to nearly identical provisions relating to the saving of state law.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be issued to review the judgment and opinion of the Court of Appeals for the Second Circuit.

Respectfully submitted,

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APPENDIX

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

United States Constitution, Article VI., Clause 2. *Supreme law.*

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof, . . ., shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

United States Code, Title 28:

§2283. *Stay of State court proceedings*

A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

§2201. *Creation of remedy*

In a case of actual controversy within its jurisdiction, . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

§1331. *Federal question*

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

§1337. *Commerce and antitrust regulations; amount in controversy, costs*

(a) The district courts shall have original jurisdiction

of any civil action or proceeding arising under any Act of Congress regulating commerce . . . .

United States Code, Title 16:

§802. *Information to accompany application for license*

Each applicant for a license hereunder shall submit to the commission — . . .

(b) Satisfactory evidence that the applicant has complied with the requirements of the laws of the State or States within which the proposed project is to be located with respect to bed and banks and to the appropriation, diversion and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting, and distributing power, and in any other business necessary to effect the purposes of a license under this Act.

(c) Such additional information as the commission may require.

§821. *State laws and water rights unaffected*

Nothing herein [16 U.S.C. §§791a et seq.] contained shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein.

United States Code, Title 43:

§383. *Vested rights and State laws unaffected*

Nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropria-

tion, use, or distribution of water used in irrigation, or any vested right acquired thereunder . . . .

Code of Federal Regulations, Title 18:
§4.41 (1978).

[An applicant for a license from FERC is required to submit copies of:]

"... special hydroelectric, waterpower, or irrigation laws of the State or States involved [which] pertain to the construction of the applicant's project . . ."

[An applicant is also required to submit:]

"[e]vidence that the applicant has complied with the requirements of the laws of the State or States within which the project is to be located with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting, and distributing power, and in any other business, necessary to effect the purposes of the license applied for, including a certificate of convenience and necessity, if required. This evidence shall be accompanied by a statement of the steps that have been taken and the steps that remain to be taken to acquire franchise or other rights from States, counties and municipalities before the project can be completed and put into operation."

Vermont Statutes Annotated, Title 30:

§248. *New electric generation and transmission facilities; certificate of public good*

(a) No company, as defined in section 201 of this title, or cooperative, may begin site preparation for or construc-

tion of an electric generation facility within the state, or electric transmission facility within the state which is designed for immediate or eventual operation at any voltage or exercise the right of eminent domain in connection with site preparation for or construction of any such transmission or generation facility, except for the replacement of existing facilities with equivalent facilities in the usual course of business, unless the public service board first finds that the same will promote the general good of the state and issues a certificate to that effect. The public service board shall hold a public hearing on each petition for such finding and certificate in a county in which any portion of the construction of the facility is proposed to be located. Notice shall be given to the attorney general, the department of public service, the department of health, agency of environmental conservation, historic sites board, scenery preservation council, state planning office, agency of transportation and by certified mail shall be given to the chairman or director of the municipal and regional planning commissions and the municipal legislative body for each town and city in which the proposed facility will be located not less than 30 days prior to the hearing. Notice of the public hearing shall be published in a newspaper of general circulation in the county or counties in which the proposed facility will be located two weeks successively, the last publication to be at least 12 days before the day appointed for the hearing.

(b) Before the public service board issues a certificate of public good, it shall find that the construction:

(1) will not unduly interfere with the orderly development of the region with due consideration having been given to the recommendations of the municipal and regional planning commissions and the municipal legislative bodies;

(2) is required to meet the need for present and future demand for service;

(3) will not adversely affect system stability and reliability and economic factors;

(4) will not have an undue adverse effect on esthetics, historic sites, air and water purity, the natural environment and the public health and safety;

(5) plans have been submitted to the municipal and regional planning commissions in accordance with this section; and

(6) is in compliance with the final plan approved by the department under section 202 of this title, or that there exists good cause to permit the proposed action.

. . . .

UNITED STATES COURT OF APPEALS
For the Second Circuit
No. 82-7837
Filed February 16, 1983

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 16th day of February, One Thousand Nine Hundred and Eighty-three.

PRESENT:

HON. WILLIAM H. TIMBERS,
HON. ELLSWORTH A. VAN GRAAFEILAND,
HON. THOMAS J. MESKILL,
Circuit Judges

TOWN OF SPRINGFIELD, VERMONT and VERMONT POWER SUPPLY AUTHORITY,
Plaintiffs-Appellees,

V. LOUISE McCARREN, ROSALYN L. HUNNEMAN and SAMUEL S. BLOOMBERG, in their official capacities as members of the State of Vermont Public Service Board,
Defendants-Appellants,

TOWN OF CAVENDISH, VERMONT,
Defendant-Intervenor Appellant.

Court of Appeals Decision

Individual members of the Vermont Public Service Board and the Town of Cavendish, Vermont appeal from a summary judgment of the United States District Court for the District of Vermont (Holden, Chief Judge), entered October 15, 1982, holding that the jurisdiction of the Federal Energy Regulatory Commission to act on the Appellee's application for a license to develop a proposed Black River hydroelectric project was exclusive to the jurisdiction assumed by the Board, and that, accordingly, the Board's ruling that it had concurrent jurisdiction was without legal force and effect.

The appellants argue before this Court that the district court lacked jurisdiction under 28 U.S.C. §1331; that the action was barred by the Anti-Injunction Act., 28 U.S.C. §2283; that the Board's ruling was binding upon the district court under the doctrine of *res judicata* and thus not subject to collateral attack; that the district court should have declined to entertain this action under the *Younger* absention doctrine; and that the authority of the Board was not preempted by the Federal Power Act. *See* 16 U.S.C. §821. We reject all these arguments substantially for the reasons set forth in the thorough Memorandum of Decision of Chief Judge Holden. *Town of Springfield et al. v. V. Louise McCarren, et al.,* F. Supp. , No. 82-157 (D. Vt. October 15, 1982).

Judgment affirmed.

Hon. William H. Timbers
s/William H. Timbers
Hon. Ellsworth A. Van Graafeiland
s/Ellsworth A. Van Graafeiland
Hon. Thomas J. Meskill
s/Thomas J. Meskill

UNITED STATES DISTRICT COURT,
for the District of Vermont.
Civ. A. No. 82-157
filed October 15, 1982

TOWN OF SPRINGFIELD, VERMONT,
and Vermont Public Power
Supply Authority

v.

V. LOUISE McCARREN, ROSALYN L. HUNNEMAN,
AND SAMUEL S. BLOOMBERG, in their
official capacities as members of the
State of Vermont Public Service Board,
Town of Cavendish, Vermont
Defendant-Interventor.

MEMORANDUM OF DECISION

HOLDEN, Chief Judge.

Plaintiffs in this action seek a declaratory judgment that the Federal Energy Regulatory Commission has exclusive jurisdiction over the licensing of the hydroelectric project they propose to build, and the Vermont Public Service Board's order finding that it had concurrent jurisdiction to issue a certificate of public good was beyond its jurisdiction, illegal, and void. The defendant Public Service Board members and the defendant-intervenor Town of Cavendish contend the Public Service Board does have jurisdiction over the licensing of the project, but they urge the court not to reach that question. They argue that absence of federal question jurisdiction, the Eleventh Amendment, the doctrine of *res judicata*, the Anti-Injunction Act, and principles of equity, comity, and federalism prevent the court

from reaching the merits of the case. The defendants have moved for a preliminary determination of the jurisdictional issues, and the plaintiffs have moved for summary judgment. The court concludes that none of the jurisdictional barriers advanced by the Board members and Cavendish precludes declaratory relief on the merits, and the plaintiffs are entitled to summary judgment.

BACKGROUND

The Town of Springfield, Vermont, and the Vermont Public Power Supply Authority have applied to the Federal Energy Regulatory Commission (FERC) for a license to construct and operate a hydroelectric project near Springfield on the Black River, a navigable river. FERC has taken jurisdiction and is considering the application.

On January 25, 1980, the Town of Cavendish petitioned the Vermont Public Service Board for a declaratory ruling that the Black River was subject to the Public Service Board's jurisdiction. The Town of Springfield appeared as respondent before the Board, and the Concerned Citizens of the Black River Valley were allowed to intervene. In an order dated April 7, 1982, and filed April 8, 1982, a majority of the Public Service Board ruled, 2-1, that it had jurisdiction over the project. *Petition of the Town of Cavendish*, P.S.B. Docket No. 4444 (April 8, 1982). The Board's order also forbade Springfield from commencing site preparation until the Board had issued a certificate of public good. *Id.*, slip op. at 4. Defendant Samuel Bloomberg was the dissenting member of the Board.

Springfield did not appeal the Board's ruling to the Vermont Supreme Court. On May 4, 1982, the plaintiffs brought this action against the Public Service Board. The

parties filed extensive briefs, and on July 30, 1982, the court heard oral argument on the defendant's application for a preliminary determination of jurisdiction and the plaintiffs' motion for summary judgment. On August 3, 1982, the court granted the plaintiffs leave to amend their complaint to substitute the individual Board members as parties defendant.

DISCUSSION

I. JURISDICTION AND RELATED ISSUES

The court turns first to the jurisdictional challenges advanced by the Board members and the Town of Cavendish as intervenor.

A. *Federal Question Jurisdiction*

The Town of Cavendish and the Public Service Board defendants urge that this court is without subject matter jurisdiction. This argument must be rejected. As Judge Coffrin held in an earlier action for declaratory and injunctive relief brought by these same plaintiffs against another Vermont state agency that sought to exercise jurisdicion over the Black River project, "it cannot seriously be doubted that the federal preemption issue here 'arises under the Constitution, laws, or treaties of the United States' so as to establish federal question jurisdiction under 28 U.S.C. §1331." *Town of Springfield v. State of Vermont Environmental Board*, 521 F. Supp. 243, 248 (D. Vt. 1981).

That the federal question presented here could possibly arise as a defense to some state court action is not controlling. "[I]f there is never (federal) jurisdiction when a state defendant has a dispositive defense grounded in federal law, the Anti-Injunction Act would be surplusage." *United Air Lines, Inc. v. Division of Industrial Safety*, 454 U.S. 944, 949, 102 S. Ct. 485, 488, 70 L.Ed.2d 255 (1981)

(opinion of White, J., dissenting from the denial of certiorari). The plaintiffs' claim here is that a federal agency has exclusive jurisdiction. This is a proposition of federal law that the plaintiffs have a right to test in federal court. The Declaratory Judgment Act was intended to provide such plaintiffs as these a tool that they might use to test the validity of propositions of federal law — assuming, of course, that a ripe and justiciable controversy exists for the court to adjudicate. The Act "exists as an instrument to protect the citizen against the dangers and damages that may result from erroneous belief as to his rights under state or federal law." *Public Service Commission v. Wycoff Co.*, 344 U.S. 237, 250-51, 73 S. Ct. 236, 243, 97 L.Ed. 291 (1952) (concurring opinion of Reed, J.).

The *Wycoff* case is one of the leading cases construing the Declaratory Judgment Act. In *Wycoff*, a carrier of motion picture films and newsreels sought a declaratory judgment that it was engaged in interstate commerce, and an injunction perpetually forbidding the Public Service Commission of Utah from "interfering" with its activities on routes authorized by the Interstate Commerce Commission. The plaintiff offered no evidence at trial of any past, threatened, or pending interference, and limited its proof to showing that it was engaged in interstate commmce. *Id.*, 344 U.S. at 240, 73 S.Ct. at 238 (opinion of the Court). The trial court found that no interference had been made or threatened. *Id.* Consequently, the Supreme Court held that there was no showing of that danger of irreparable injury which is necessary to equitable relief by injunction. *Id.* at 240-41, 73 S.Ct. at 238. To the Court, it appeared that that plaintiff (the respondent on appeal) had "abandoned the suit as one for injunction but [sought] to support it as one for declaratory judgment." *Id.* at 241, 73 S.Ct. at

239. The Court accordingly directed its attention to the prerequisities for jurisdiction in a declaratory action.

The Court found the "disagreement" between the parties was too "nebulous," *id.* at 244, 73 S.Ct. at 240:

> The complainant in this case does not request an adjudication that it has a right to do, or to have, anything in particular. *It does not ask a judgment that the Commission is without power to enter any specific order or take any concrete regulatory step.* It seeks simply to establish that, as presently conducted, respondent's carriage of goods between points within as well as without Utah is all interstate commerce. One naturally asks, "So what?" To that ultimate question no answer is sought.

Id. (emphasis added).

Because the question as to whether the Wycoff Company was engaged in interstate commerce was too abstract, unripe, and meaningless except as a defense to a possible state action, the Court ordered that the case should be dismissed. The opinion contains a widely-quoted but somewhat ambiguous dictum:

> Respondent here has sought to ward off possible action of the petitioners by seeking a declaratory judgment to the effect that he will have a good defense when and if that cause of action is asserted. Where the complaint in an action for declaratory judgment seeks in essence to assert a defense to an impending or threatened state court action, it is the character of the threatened action, and not of the defense, which will determine whether there is federal-question jurisdiction in the District Court. If the cause of action, which the declaratory defendant threatens to assert, does not

> itself involve a claim under federal law, it is doubtful if a federal court may entertain an action for a declaratory judgment establishing a defense to that claim. This is dubious even though the declaratory complaint sets forth a claim of federal right, if that right is in reality in the nature of a defense to a threatened cause of action.

Id. at 248, 73 S.Ct. at 242.

While the Court did no more than express doubts about the existence of federal question jurisdiction in such cases, *see United Air Lines, Inc. v. Division of Industrial Safety*, *supra*, 454 U.S. at 949-50, 102 S.Ct. at 488 (opinion of White, J., dissenting from the denial of certiorari), lower courts have since adopted the dictum as a basis for holding that no federal question jurisdiction existed in particular settings. There is, however, a split of authority on the proper interpretation and application of the *Wycoff* dictum. Some courts have held that, while federal question jurisdiction is lacking where the declaratory plaintiff seeks a declaration of federal rights that has no meaning apart from a state court action, federal question jurisdiction does exist where the declaratory plaintiff has an actual and present controversy with the declaratory defendant and seeks a declaration of federal law that has meaning independent of any state case, even though the federal right might also be asserted as a defense in a state case. In cases where the declaratory plaintiffs challenge state regulatory schemes on federal preemption grounds, these courts hold that federal question jurisdiction exists if there is a ripe and justiciable controversy and the declaratory plaintiffs are subject to conflicting state and federal regulation, even though the declaratory plaintiffs may be defendants in state court actions. A second body of precedent holds that federal pre-

emption can only be in the nature of a defense to a state court action and provides no independent basis for federal question jurisdiction in a suit for a declaratory judgment.

The First and Fifth Circuits, and, with one aberration, the Ninth Circuit, have adopted the first approach; the Sixth, Eighth, and Tenth Circuits have hewed to the latter approach; the Third Circuit, after expressly reserving decision, also appears to have taken the latter approach; and the Second Circuit has apparently not yet spoken.[1] *See*

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1 While the court has been unable to locate any Second Circuit case discussing federal question jurisdiction in a declaratory suit challenging state regulation on the ground of federal pre-emption, another case may provide some inkling of how it might rule. In *Warner-Jenkinson Co. v. Allied Chemical Corp.*, 567 F.2d 184 (2d Cir. 1977), the Second Circuit dealt with a related problem of federal question jurisdiction, and took a somewhat broader view of jurisdiction than other courts have done. *Warner-Jenkinson* was a licensee's challenge to the validity of a patent. The Third Circuit had previously held that a licensee could not bring suit in federal court for a declaration of patent invalidity when the licensor had threatened to bring suit for breach of the licensing agreement. *Thiokol Chemical Corp. v. Burlington Industries, Inc.*, 448 F.2d 1328 (3d Cir. 1971), *cert. denied*, 404 U.S. 1019, 92 S.Ct. 684, 30 L.Ed.2d 668 (1972). Under these circumstances, the Third Circuit held, invalidity of the patents at issue could only arise as a defense to a state law suit. *Id.* 448 F.2d at 1330-31. The D.C. Circuit subsequently criticized the holding in *Thiokol Chemical Corp.* as being "of questionable force." *Hanes Corp. v. Millard*, 531 F.2d 585, 594 n. 8 (D.C.Cir.1976). The Second Circuit, in *Warner-Jenkinson*, did not definitively adopt the position of either the Third Circuit or the D.C. Circuit:

> If the plaintiffs were seeking a declaration of their right to assert patent invalidity as a defense to a contract action for royalties, which itself could not be brought in federal court [citations

First Federal Savings & Loan Association v. Greenwald, 591 F.2d 417, 423 n. 8 (1st Cir. 1979); *Braniff International, Inc. v. Florida Public Service Commission*, 576 F.2d 1100, 1104-06 (5th Cir. 1978); *Conference of Federal Savings and Loan Associations v. Stein*, 604 F.2d 1256, 1259 (9th Cir. 1979), *aff'd mem.*, 445 U.S. 921, 100 S.Ct. 1304, 63 L.Ed.2d 754 (1980); *and Rath Packing Co. v. Becker*, 530 F.2d 1295 (9th Cir. 1975), *aff'd sub nom. Jones v. Rath Packing Co.*,

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omitted], one might conclude that no 'arising under' jurisdiction would be present. See *Thiokol Chemical Corp. v. Burlington Industries* [citation omitted]. See also *Hanes Corp. v. Millard*, 174 U.S.App. D.C. 253, 531, F.2d 585, 594-95 n. 8 (1976).

Warner-Jenkinson, *supra*, at 186-87. But the court found it unnecessary to take sides because in *Warner-Jenkinson*, there was no breach of contract suit pending in state court, and the declaratory defendant could either bring a contract suit in state court or a patent infringement suit in federal court. Thus patent invalidity, while a possible defence to a state suit, also created federal question jurisdiction. *Id.* at 187.

The Second Circuit cited *Skelly Oil v. Phillips Petroleum Co.*, 339 U.S. 667, 671-72, 70 S.Ct. 876, 879, 94 L.Ed. 1194 (1950), for the thesis that "an action for declaratory judgment may be brought in federal court ordinarily only if there would exist a basis for federal jurisdiction in a coercive action between the parties." *Warner-Jenkinson*, *supra*, 567 F.2d at 186. The *Skelly Oil Co.* Court had articulated the point in this way:

> Prior to [the Declaratory Judgment Act], a federal court would entertain a suit on a contract only if the plaintiff asked for an immediately enforceable remedy like money damages or an injunction, but such relief could only be given if the requisites of jurisdiction, in the sense of federal right or diversity, provided foundation for resort to a federal court. The Declaratory Judgment Act allowed relief to be given by way of recognizing the plaintiff's right even though no immediate enforcement of it was asked. But the requisites of jurisdiction — the limited subject

430 U.S. 519, 97 S.Ct. 1305, 51 L.Ed.2d 604 (1977); *but cf. United Air Lines, Inc. v. Division of Industrial Safety*, 633 F.2d 814 (9th Cir. 1980), *cert. denied*, 454 U.S. 944, 102 S.Ct. 485, 70 L.Ed.2d 255 (1981). *Contra, Exxon Corp. v. Hunt*, 683 F.2d 69 (3d Cir. 1982); *Michigan Savings and Loan League v. Francis*, 683 F.2d 957, 961-62 (6th Cir. 1982) (2-1);[2] *Lawrence County v. State of South Dakota*,

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matters which alone Congress had authorized the District Courts to adjudicate — were not impliedly repealed or modified.

Skelly Oil Co., supra, 339 U.S. at 671-72, 70 S.Ct. at 879. The Harvard Law Review note cited with apparent approval in *Skelly Oil Co., id.* at 674, 70 S.Ct. at 880, suggested that federal jurisdiction over a declaratory suit is proper where a coercive cause of action had already accrued to either party, "or if it is relatively certain that coercive [federal court] litigation will eventually ensue between the same parties if a declaration is refused." *Developments in the Law — Declaratory Judgments — 1941 - 1949*, 62 Harv.L.Rev. 787, 794 (1949).

Adopting this line of analysis, the court finds it need not determine at this point whether the plaintiffs currently have a good coercive cause of action — that is to say, whether they are now entitled to injunctive relief — because it is relatively certain that in the absence of declaratory relief, the plaintiffs would eventually satisfy the prerequisites for injunctive relief.

2 The majority in *Michigan Savings and Loan League, supra*, cited *Williams v. First Federal Savings and Loan Association of Arlington*, 651 F.2d 910 (4th Cir. 1980), for the proposition that the Fourth Circuit has joined the Eighth and Tenth Circuits in holding that federal pre-emption cannot form the basis for a declaratory action in the federal Courts. See *Michigan Savings and Loan League, supra*, 683 F.2d at 962. This interpretation of *Williams* is highly questionable. The Fourth Circuit, in *Williams*, in fact took jurisdiction over the case but found it unnecessary to reach the question of federal preemption because it resolved the suit on state law grounds. *Williams, supra*, 651 F.2d at 921-23. While the *Williams* court expressed some doubts as to federal question jurisdiction in the case, it proceeded on the belief

668 F.2d 27, 30-32 (8th Cir. 1982); *Home Federal Savings and Loan Association v. Insurance Department*, 571 F.2d 423, 426 (8th Cir. 1978); *cf. Madsen v. Prudential Federal Savings & Loan Association*, 635 F.2d 797, 803-04 (10th Cir. 1980), *cert. denied*, 451 U.S. 1018, 101 S.Ct. 3007, 69 L.Ed.2d 389 (1981). *See also Trent Realty Associates v. First Federal Savings & Loan Association*, 657 F.2d 29, 34 (3d Cir. 1981) ("We need not decide whether an original action by First Federal in which the complaint specifically referred to the federal regulations and sought declaratory and injunctive relief on the ground of federal preemption could be maintained in federal court"); *compare Allegheny Airlines, Inc. v. Pennsylvania Public Utility Commission*, 465 F.2d 237, 241 (3d Cir. 1972), *cert. denied*, 410 U.S. 943, 93 S.Ct. 1367, 35 L.Ed.2d 609 (1973) (dictum implying no federal jurisdiction would exist but for diversity of parties), *with National State Bank v. Long*, 630 F.2d 981 (3d Cir. 1980) (assuming jurisdiction *sub silentio* on facts virtually identical to those of *Conference of Federal Savings and Loan Associations v. Stein, supra*, in which the Ninth Circuit upheld jurisdiction, and *Michigan Savings and Loan League v. Francis, supra*, in which the Sixth Circut found there was no jurisdiction).

In *First Federal Savings & Loan Association v. Greenwald, supra*, the First Circuit held that federal question

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that all of the cases consolidated for decision properly raised a federal question. *Id.* at 913 n. 2. Indeed, the *Williams* case was cited by the appellee, First Federal, in *Trent Realty Associates v. First Federal Savings and Loan Association*, 657 F.2d 29 (3d Cir. 1981), as support for the proposition that federal question jurisdiction existed in that case, in which First Federal had won a summary judgment on the merits in the district court. The Third Circuit found it difficult to parse the *Williams* decision. *Trent Realty*, 657 F.2d at 35.

jurisdiction existed where the declaratory plaintiffs sought an adjudication that certain Massachusetts banking legislation was preempted by the Real Estate Settlement Procedures Act of 1974, 12 U.S.C. §2601 *et seq.* In that case, First Federal had been sued in state court by the Massachusetts Commissioner of Banks, and had removed that action to federal court. First Federal filed a counterclaim in federal court seeking a declaratory judgment that the state legislation had been preempted. In addition, First Federal, together with a number of other savings and loan associations, instituted a separate civil action also praying for a declaratory judgment of preemption. The two lawsuits were consolidated for hearing and decision. While the First Circuit considered the question whether the Commissioner's state action had been properly removed "not easy," *id.* at 423[3], it found that question unnecessary to decide, since

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[3] There is a split of authority as to whether removal jurisdiction exists where the defendant contends that the plaintiff's state law claims have been preempted by federal law. Among the cases upholding removal jurisdiction under such circumstances are *Avco Corp. v. Aero Lodge No. 735*, 390 U.S. 557, 88 S.Ct. 1235, 20 L.Ed.2d 126 (1968) (state court suit seeking injunction against strike in violation of "no-strike" provision of collective bargaining agreement held properly removed to federal court; suit deemed to arise under § 301 of the Labor Management Relations Act, which preempts state law); *North Davis Bank v. First National Bank of Layton*, 457 F.2d 820 (10th Cir. 1972) (state suit for injunction against construction of branch bank allegedly in violation of Utah banking law held properly removed because definition of "branch bank" arises under federal law); *Johnson v. England*, 356 F.2d 44 (9th Cir. 1966), *cert. denied*, 384 U.S. 961, 86 S.Ct. 1588, 16 L.Ed.2d 674 (1966) (state suit seeking order compelling arbitration of labor dispute held properly removed because federal labor law preempts state law); *Teamsters Local Union No. 116 v. Fargo-Moorhead Automobile Dealers Association*, 459 F.Supp. 558 (D.N.D. 1978), *rev'd on other grounds*, 620 F.2d 204 (8th Cir. 1980) (state

"[t]he matter of preemption and related federal issues were the focal point of the declaratory judgment suit, hence federal question jurisdiction existed in that case under any analysis." *Id.* (footnote omitted).

Similarly, in *Rath Packing Co. v. Becker, supra*, the Ninth Circuit held that the district court had federal question jurisdiction over a suit in whch a bacon processor

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suit for enforcement of labor arbitration award held properly removed); *First Federal Savings & Loan Association of Jackson County v. First Federal Savings & Loan Association of Huntsville*, 446 F.Supp. 210 (N.D.Ala.1978) (state suit expressly based entirely upon state and common law of unfair competition held properly removed because law of unfair competition between federal savings and loan associations was preempted by federal regulations); *State of New York v. Local 144*, 410 F.Supp. 225 (S.D.N.Y.1976) (state suit founded on state statutory and constitutional provisions held properly removed because federal law had preempted the law relating to strikes against health care institutions); and *Rettig v. Arlington Heights Federal Savings and Loan Association*, 405 F.Supp. 819 (N.D.Ill.1975) (state suit charging breach of fiduciary duties and improper diversion of funds under state law held properly removed because federal law relating to federal savings and loan associations was preemptive).

Other cases hold to the contrary. *First National Bank of Aberdeen v. Aberdeen National Bank*, 627 F.2d 843 (8th Cir. 1980) (state suit relying on state law of unfair competition held improperly removed; federal preemption of banking regulations is only in the nature of a defense to the state suit); *State v. American League of Professional Baseball Clubs*, 460 F.2d 654 (9th Cir. 1972) (state case alleging violations of state and federal antitrust laws held improperly removed; since the state court had no jurisdiction over federal antitrust claims, the federal court could have no jurisdiction on removal of those claims; as for state antitrust claims, "federal preemption is a matter of defense to a state law claim, and not a ground for removal," *id.* at 660); *Marquette National Bank of Minneapolis v. First National Bank of Omaha*, 422 F.Supp. 1346 (D.Minn.1976) (state suit alleging, *inter alia*, violation of Minnesota usury law held improperly removed; con-

sought declaratory and injunctive relief against the enforcement of California's meat labelling laws on the ground that they were preempted by the Wholesome Meat Act of 1967, 21 U.S.C. §601 *et seq.*, and a federal regulation promulgated thereunder. As in *First Federal Savings & Loan, supra*, the course of events began with state enforcement efforts. State officials first ordered 84 lots of Rath bacon "off sale" for short weight. Subsequently, they commenced litigation in two state courts to enforce the state meat weight labelling law. Rath removed both actions to federal district court and also filed two declaratory judgment actions in federal district court. After the filing of the declaratory complaints, the district court remanded the enforcement actions to the state courts, but it later refused to dismiss Rath's declaratory suits. The Ninth Circuit affirmed the district court's jurisdictional determination. *Rath, supra*, 530 F.2d at 1302-03.

The Court of Appeals in *Rath* contrasted the case with *Chandler v. O'Bryan*, 445 F.2d 1045 (10th Cir. 1971), *cert. denied*, 405 U.S. 1049, 92 S.Ct. 1310, 31 L.Ed.2d 592 (1972). In *Chandler*, O'Bryan had brought a libel action against Chandler, a United States district judge, in state court. O'Bryan alleged that Chandler had libelled him in statements made to a newspaper. Chandler removed the action to federal court, but the federal district court, finding that the statements were not made in the course of Chandler's official duties or under the color of his office, remanded the

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tention that federal regulation of national banks preempts state law was a matter of defense); *State of New York v. Local 115*, 412 F.Supp. 720 (E.D.N.Y.1976) (if the plaintiff's claim depends upon the continued vitality of state labor law, contention that federal labor law had preempted the field was not enough to support removal).

Whatever the proper resolution of this issue may be, removal jurisdiction is not implicated in the instant case.

case to state court, since there was no diversity of citizenship. After O'Bryan won a verdict in state court, Chandler sued in federal court for a declaratory judgment to set aside the state judgment. The Tenth Circuit, reversing the trial court, held that the federal courts lacked subject matter jurisdiction, since "Judge Chandler's assertion of judicial immunity [was] 'in reality in the nature of a defense' to that suit." *Id.*, 445 F.2d at 1056.

The *Rath* court distinguished the two cases:

> Unlike *Chandler*, Rath's claims have vitality in the absence of the litigation in state court; Rath had the right to a federal forum before the institution of the state court actions. Chandler's federal claim was purely in the nature of a defense to the libel action. Brought without reference to the underlying state court proceeding, Chandler's claim would be a useless gesture: no one would care whether Chandler acted under the protection accorded by the courts to his office if O'Bryan had refrained from suing him. That Rath's claim is or can be the basis for a defense to the state court actions states a mere truism; the test is whether Rath has created a federal controversy where none existed or is seeking an adjudication of a claim which is essentially meaningful only when pleaded as a defense to the particular pending state court actions.

Rath, supra, 530 F.2d at 1305-06 (footnote omitted). Because Rath was subjected to conflicting state and federal requirements, there was a ripe and ongoing controversy that gave rise to federal question jurisdiction. The Supreme Court, in affirming the Ninth Circuit on the merits, did not deem the defendants' jurisdictional objections worthy of discussion. Despite the fact that the jurisdictional issue had been raised below and was addressed at length by the Court

of Appeals, *see id.*, 530 F.2d at 1302-06, both the Supreme Court majority and Justices Rehnquist and Stewart, dissenting in part, proceeded directly to the merits without questioning jurisdiction over the case. *Jones v. Rath Packing Co., supra*, 430 U.S. 519, 97 S.Ct. 1305, 51 L.Ed.2d 604 *passim*.

The reasoning of another panel of the Ninth Circuit in *Conference of Federal Savings and Loan Associations v. Stein, supra*, was similar to that of the Court of Appeals in *Rath*. *Stein* was a challenge to state "anti-redlining" regulations. "Redlining" is mortgage credit discrimination based on the characterstics of the neighborhood surrounding the would-be borrower's dwelling. The Federal Home Loan Bank Board had promulgated anti-redlining regulations implementing the Home Owners' Loan Act of 1933, 12 U.S.C. §1461 *et seq.*, and various federal civil rights statutes. California also adopted a statute that set up a detailed anti-redlining regulatory scheme. The plaintiffs, all federally chartered savings and loan associations, sued for a declaratory judgment that the California Housing Financial Discrimination Act of 1977, as applied to them, was preempted by federal legislation and regulations. The defendant contended there was no federal question jurisdiction because preemption was only a defense to a potential state case, citing *Public Service Commission v. Wycoff Co., supra*. The court rejected this contention, distinguishing *Wycoff* on the ground that in that case "there was no proof of any threatened or probable act by the state commission which might cause the irreparable injury essential to equitable relief or which could serve to create the actual controversy necessary for declaratory judgment jurisdiction." *Stein, supra*, 604 F.2d at 1259. The *Stein* court noted that, as in *First Federal Savings & Loan, supra*, " 'Both the state

and federal regulations [were] currently in effect, subjecting the associations to conflicting requirements,'" and accordingly "[a]n actual justiciable controversy [was] thus presented." *Stein, supra*, 604 F.2d at 1259. On appeal, the Supreme Court summarily affirmed. *Stein v. Conference of Federal Savings and Loan Associations*, 445 U.S. 921, 100 S.Ct. 1304, 63 L.Ed.2d 754 (1980) (mem.).

In *Braniff International, Inc. v. Florida Public Service Commission, supra*, the Fifth Circuit was also called upon to construe *Wycoff*. The district court had dismissed the case for want of subject matter jurisdiction, so the only question on appeal was the existence *vel non* of federal question jurisdiction. The facts were similar to those of the instant case. The plaintiffs, six airlines, were required under federal law to obtain "Certificates of Public Convenience and Necessity" from a federal agency, the Civil Aeronautics Board. The Florida Legislature passed a statute subjecting airlines to further regulation by the defendant Florida Public Service Commission. One of the plaintiff airlines had failed to comply with a Florida Public Service Commission rule regarding notice of change of schedule. A state-certified airline filed a complaint before that body, which then issued an order that the offending airline, Southern Airways, Inc., show cause why it should not be fined or ordered to cease and desist from the offending conduct. Southern, instead of complying with the show cause order, joined with five other airlines in filing suit against the Commission and its individual members in federal district court for declaratory relief that the State regulatory scheme violated the Supremacy Clause, the Commerce Clause, and the Due Process and Equal Protection Clauses of the Fourteenth Amendment. The complaint also sought an injunction against enforcement of the state regulatory plan.

District Court Decision

The district court, relying on *Wycoff*, dismissed the case:

> [P]laintiffs have failed to make out a case for federal-question jurisdiction. This action seeks merely to obtain for plaintiffs a federal defense to the action pending before the Florida Public Service Commission. The cause of action which defendants threaten to institute will involve only an issue of state law — whether plaintiffs should be required to comply with the PSC's notice provision. That a defense based on federal law will be asserted is immaterial to the jurisdiction of this court.

Quoted in Braniff International, id., 576 F.2d at 1103.

The Fifth Circuit, speaking through Circuit Judge Elbert Tuttle, reversed. At the outset, the court noted that "during the 26 years since its decision in *Wycoff*, the Supreme Court has never invoked the rationable [of the dictum in *Wycoff*] to obtain the result reached by the district court here." 576 F.2d at 1104. Judge Tuttle conceded that several courts of appeals had relied on the *Wycoff* dictum to sustain dismissals for lack of subject matter jurisdiction. "However, the only common threat [*sic*] appearing in these cases is the dearth of discussion and analysis." *Id.* The court proceeded to identify several features of the *Wycoff* case that limit the applicability of its dictum:

> The *Wycoff* Court, with the benefit of a full trial record, had determined on the merits that no injunction could issue, since there was "no proof of any threatened or probable act of the defendants which might cause the [requiste] irreparable injury." In the present case the state, through the Commission, already had set in motion the very regulatory processes whose constitu-

> tionality was challenged through appellants' suit. As developed by the pleadings and other matters thus far a part of the record, it simply cannot be said that injunctive relief is foreclosed here as it was in *Wycoff*. Appellants' suit, therefore, cannot be characterized as nothing more than an attempt "to ward off possible action of the appellees by seeking a declaratory judgment to the effect that [they] will have a good defense when and if" that action is taken.
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> Nor can it be doubted that these appellants, whose standing in this matter cannot seriously be questioned, have not presented a true "case or controversy" as required by Article III. That defect undoubtedly played a crucial role in the judicial demise of the *Wycoff* plaintiff's claim. Here, however, the circumstances show that "there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant [relief]."

Id. at 1105 (citations and footnote omitted) (bracketed text supplied by the Fifth Circuit).

The Fifth Circuit concluded: "That appellants' constitutional claim is or may be a defense to the Commission's actions states a mere truism; it is not, under the circumstances, a limitation upon the power of the district court to entertain the controversy before it." *Id.* at 1106. It held that where a party seeks declaratory and injunctive relief against the enforcement of an unconstitutional state statute, if the other requirements for the taking of federal question jurisdiction are met, the "mere fact that the constitutional claims might be raised before a state administrative body

charged with enforcement of the statute does not alone deprive the court of jurisdiction." *Id.* (footnote omitted).[4]

Those courts of appeals that have held federal preemption cannot form the basis for federal question jurisdiction in a declaratory action have rested their decisions on the ground that federal preemption was 'actually' in the nature of a defense to a state law claim. *E.g., United Air Lines, Inc. v. Division of Industrial Safety, supra,* 633 F.2d at 817 ("United's allegations of federal question jurisdiction in this appeal remain defensive in nature"). This reasoning proves too much. Parties who object to state statutes, regulations, or administrative rulings on Supremacy Clause or other federal law grounds frequently prefer to bring anticipatory challenges, for declaratory or injunctive relief, or for both, rather than await the opportunity to make their defense in state enforcement actions in which they face the danger of punishment should their objections turn out to be ill-founded. *Cf. Ex parte Young,* 209 U.S. 123, 165, 28 S. Ct. 441, 456, 52 L.Ed. 714 (1908). All such anticipatory, declaratory and injunctive actions are essentially "defensive in nature." Nonetheless, if the controversy is ripe and justiciable, the federal courts have jurisdiction to declare the rights of the parties.

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[4]Here, the plaintiffs' Supremacy Clause challenge is not directed at a state statute, but an administrative ruling. This distinction does not make the Fifth Circuit's analysis inapplicable. Moreover, though plaintiffs seek only declaratory relief, plus "such other and further relief as is just and appropriate," it is "relatively certain," *see above,* note 1, that in the absence of declaratory relief the plaintiffs would eventually have a coercive cause of action for equitable relief since, as in *Braniff International,* here the Public Service Board "already had set in motion the very regulatory processes" whose constitutionality is challenged. *Id.,* 576 F.2d at 1105.

In the *United Air Lines* case, *supra*, United Air Lines brought suit to enjoin the enforcement of California health and safety regulations at United's facilities at the San Francisco International Airport. United alleged that the jurisdiction of the Federal Aviation Agency over their facilities was exclusive, and that California law was pre-empted. The Court of Appeals reversed the district court's grant of a preliminary injunction. Without citing either *Conference of Federal Savings and Loan Associations v. Stein*, *supra*, or *Rath Packing Co. v. Becker*, *supra*, both of which were recent Ninth Circuit precedents that had been affirmed by the Supreme Court, the court held there was no subject matter jurisdiction. "It is Hornbook Law that federal jurisdiction must affirmatively appear in the complaint." *United Air Lines*, *supra*, 633 F.2d at 815. "It is not enough that a federal question appears in the complaint as an anticipation of or reply to a probable defense [citations omitted], or that the claim asserted is in the nature of a defense to a threatened or pending action." *Id.* at 816-17.

The Supreme Court denied certiorari. *United Air Lines, Inc. v. Division of Industrial Safety*, *supra*, 454 U.S. 944, 102 S. Ct. 485, 70 L.Ed.2d 255 (1981). Justice White dissented from this disposition of the case. He considered the Ninth Circuit to have "confused two distinct lines of reasoning." Id. at 946, 102 S. Ct. at 486 (opinion of White, J., dissenting from the denial of certiorari). One of those lines was the familiar rule in the *Mottley* case, *Louisville & Nashville R. Co. v. Mottley*, 211 U.S. 149, 29 S. Ct. 42, 53 L.Ed. 126 (1908), that a plaintiff cannot get into federal court on the basis of a federal defense the plaintiff expects the defendant to assert:

In each of the above cases [*Mottley*, *Tennessee v.*

> *Union and Planters Bank*, 152 U.S. 454, 14 S. Ct. 654, 38 L.Ed. 511 (1894); *Metcalf v. Watertown*, 128 U.S. 586, 9 S. Ct. 173, 32 L.Ed. 543 (1888), [the federal plaintiff's cause of action against the defendant was not grounded in federal law; he merely sought to adjudicate the validity of an anticipated defense to his action. Here, United's complaint, as I read it, included the claim that under federal law the Federal Aviation Administration had exclusive jurisdiction to oversee safety at airline maintenance facilities and therefore, under the supremacy clause, state regulation was foreclosed. No part of this claim was grounded in state law.

United Air Lines, Inc. v. Division of Industrial Safety, supra, 454 U.S. at 947, 102 S. Ct. at 487 (opinion of White, J., dissenting from the denial of certiorari).

The second line of reasoning, Justice White wrote, substantially misread [the Supreme Court's] previous cases on when the 'defensive' character of a federal question is insufficient to create federal-court jurisdiction." *Id.* at 946, 102 S. Ct. at 486. He construed the dismissal in *Wycoff* to have resulted "because the federal claim was too abstract, anticipatory, and not ripe for decision." *Id.* at 949, 102 S. Ct. at 488. He criticized the holding of the Court of Appeals:

> The suggestion that a defendant in a pending or threatened state action based on state law is foreclosed on jurisdictional grounds from seeking a federal declaratory judgment or an injunction based on the claim that the state action is barred by federal statute or the Federal Constitution makes little sense in light of the holdings of this Court. Under the *Younger v. Harris*, 401 U.S. 37 [91 S. Ct. 746, 21 L.Ed.2d 639] (1971), line

> of cases, comity and federalism require a federal court to hold its hand and dismiss rather than interfere with a pending state criminal proceeding, by adjudicating a federal defense that has been or might be raised in that proceeding. Certain civil proceedings are subject to the same rule. But these holdings do not rest on jurisdictional grounds, and they do not apply when a state proceeding is not pending and in any event do not apply to all civil proceedings. Furthermore, if there is never federal jurisdiction when a state defendant has a dispositive defense grounded in federal law, the Anti-Injunction Act would be surplusage. Under this theory, all such litigants would be required to pursue their federal claims in state court. Perhaps they should, but that is not what the present jurisdictional statutes and our cases construing them require.
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> . . .
>
> In my view, the holding below is wrong. *United Air Lines, supra*, 454 U.S. at 948-50, 102 S. Ct. at 488.

Counsel for the Town of Cavendish suggested at oral argument that since Justice White failed to get three of his colleagues to join him to grant certiorari, all eight remaining Justices approved the lower court's reasoning. There is no merit whatsoever to this contention. The denial of certiorari means nothing other than that the Supreme Court chose not to review the case. As Justice Frankfurter once explained:

> The sole significance of . . . denial of a petition for certiorari need not be elucidated to those versed in the Court's procedures. It simply means that fewer than four members of the Court deemed it desirable to review a decision of the lower court as a matter of "sound

> judicial discretion." A variety of considerations underlie denials of the writ, and as to the same petition different reasons may lead different Justices to the same result . . . Narrowly technical reasons may lead to denials. Review may be sought too late; the judgment of the lower court may not be final . . . A case may raise an important issue but the record may be cloudy. It may be desirable to have different aspects of an issue further illumined by the lower courts. Wise adjudication has its own time for ripening.

Maryland v. Baltimore Radio Show, 338 U.S. 912, 917-18, 70 S. Ct. 252, 254, 94 L.Ed. 562 (1950) (opinion of Frankfurter, J., respecting the denial of the petition for writ of certiorari). The Supreme Court has since reiterated that it is "well-settled" that a denial of certiorari imports no implication concerning its view of the merits. *Hughes Tool Co. v. Trans World Airlines*, 409 U.S. 363, 366 n. 1, 93 S. Ct. 647, 650 n. 1, 34 L.Ed.2d 577 (1973).

As Justice White pointed out in *United Air Lines, supra*, 454 U.S. at 948, 102 S.Ct. at 488, no Supreme Court case has ever held that a federal court cannot take cognizance of an action predicated on federal question jurisdiction and seeking a declaration that federal law preempts state regulations. On the contrary, the Supreme Court has routinely heard cases asking for declaratory or injunctive relief against state regulation alleged to be preempted by federal law, and it has adjudicated those cases on the merits, without any doubt as to jurisdiction. *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 98 S.Ct. 988, 55 L.Ed.2d 179 (1978); *Jones v. Rath Packing Co., supra*, 430 U.S. 519, 97 S.Ct. 1305, 51 L.Ed.2d 604 (1977); *Burbank v. Lockheed Air Terminal*, 411 U.S. 624, 93 S.Ct. 1854, 36 L.Ed.2d 547 (1973); *Florida Avocado Growers v. Paul*, 373 U.S. 132, 83

S.Ct. 1210, 10 L.Ed.2d 248 (1963); *Heinz v. Davidowitz*, 312 U.S. 52, 61 S.Ct. 399, 85 L.Ed. 581 (1941), *cited in United Air Lines, supra*, 454 U.S. at 948, 102 S.Ct. at 488 (opinion of White, J., disenting from the denial of certiorari). Counsel has not called to the attention of the court any Second Circuit case adopting the approach of the circuit court in *United Air Lines, supra*, nor has the court been able to locate any such Second Circuit case. The court chooses to follow the First and Fifth Circuits, *see First Federal Savings & Loan Association v. Greenwald, supra*, and *Braniff International, supra;* the two Ninth Circuit precedents affirmed by the Supreme Court, *Rath* and *Stein*, discussed above; and this District's own precedent, *Town of Springfield v. State of Vermont Environmental Board supra*, and finds the reasoning of the circuit court in *United Air Lines, supra*, unpersuasive. This case is "quite different from *Public Service Comm'n v. Wycoff Co.*, 344 U.S. 237, 73 S.Ct. 236, 97 L.Ed. 291, where a carrier sought relief in a federal court against a state commission in order 'to guard against the possibility,' *id.*, at 244, 73 S.Ct. at 240, that the Commission would assume jurisdiction." *Public Utilities Commission v. United States*, 355 U.S. 534, 538-39, 78 S.Ct. 446, 450, 2 L.Ed.2d 470 (1958). Here, as in *Public Utilities Commission v. United States, id.*, the Public Service Board has already assumed jurisdiction. The court is satisfied that the plaintiffs' case rests on its own footing on a proposition of federal law. The controversy is ripe and justiciable. Accordingly the court has jurisdiction under 28 U.S.C. §1331 to hear the case.

B. *Sovereign Immunity*

The defendants contend the court lacks jurisdiction over the case because the Eleventh Amendment "bars suits against members of the Vermont Public Service Board

in their official capacities." Answer to First Amended Complaint, ¶14. This defense is of no avail to them.

The Public Service Board was initially impleaded as the sole defendant. The Town of Cavendish urged that sovereign immunity barred the suit. By order dated August 3, 1982, the court granted the plaintiffs leave to amend their complaint to substitute the individual members of the Board as parties defendant, since "the court decline[d] at [that] stage to dismiss the case for technical reasons without affording an opportunity to remedy the defect." *Town of Springfield v. Sate of Vermont Public Service Board*, No. 82-157, slip op. at 1 (D. Vt. Aug. 3, 1982).

There can be no doubt that the Eleventh Amendment is no bar to this suit in its present posture:

> It is established that the Eleventh Amendment bars unconsented suits against state agencies as well as States, even where the relief sought is equitable in nature. *Alabama v. Pugh*, 438 U.S. 781 [98 S.Ct. 3057, 56 L.Ed.2d 1114] (1978) (*per curiam*). But it is equally well established, and it is a bulwark of our regime of rule by law, that courts have the power to restrain lawless conduct by government officials. *Ex parte Young*, 209 U.S. 123 [28 S.Ct. 441, 52 L.Ed. 714] (1908); *Association of American Medical Colleges v. Carey*, 482 F.Supp. 1358, 1361-62 (N.D.N.Y. 1980). Thus any suit seeking only equitable relief against state officials can be heard, provided the equitable relief does not in fact amount to retroactive damages, *Edelman v. Jordan*, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974), if only individuals are named defendants, and if there is an allegation of conduct that violates state or federal law, *cf. Cory v. White*, — U.S. — , 102 S.Ct. 2325, 72 L.Ed.2d 694 (1982).

Town of Springfield v. State of Vermont Public Service Board, supra, slip op. at 1.

The court now entertains some doubt as to whether the doctrine of sovereign immunity was a bar to this suit even in its original posture. *Cf. Mississippi Railroad Commission v. Illinois Central Railroad Co.*, 203 U.S. 335, 340, 27 S.Ct. 90, 92, 51 L.Ed. 209 (1906): "The first objection raised by the appellant is, that this suit is, in substance, one against a State. The commission was created by the State of Mississippi, under the authority of its constitution and laws, for the purpose of supervising, and to some extent controlling, the acts of railroads within the State. Such a commission is subject to a suit by a citizen [citing cases]." *Accord, Prentis v. Atlantic Coast Line*, 211 U.S. 210, 230, 29 S.Ct. 67, 71, 53 L.Ed. 150 (1908) (Holmes, J.) ("We may add that when the rate is fixed a bill *against the commission* to restrain the members from enforcing it will not be bad as an attempt to enjoin legislation or as a suit against a State, *and will be the proper form of remedy*") (emphasis added); *Murray v. Transit Commission*, 11 F.Supp. 27, 28-29 (S.D.N.Y. 1935), *aff'd per curiam on opinion below*, 104 F.2d 1017 (2d Cir. 1939) (L. Hand, Swan, and Chase, JJ.).

In any event, this suit as it is now cast against the individual Public Service Board members is not within the proscription of the doctrine of sovereign immunity exemplified in the Eleventh Amendment. In the eyes of the law, illegal action by state officials is not the action of the State. "[T]he use of the name of the State to enforce an unconstitutional act to the injury of the complainants is a proceeding without the authority of and one which does not affect the State in its sovereign or governmental capacity. It is simply an illegal act on the part of a state official . . ." *Ex*

parte Young, supra, 209 U.S. at 159, 28 S.Ct. at 453. Defendants' Eleventh Amendment defense is without merit.

C. *Res judicata*

The Public Service Board defendants and the Town of Cavendish urge that the Board's ruling is *res judicata,* and therefore cannot be collaterally attacked. Judge Coffrin, relying on *Durfee v. Duke,* 375 U.S. 106, 114, 84 S.Ct. 242, 246, 11 L.Ed.2d 186 (1963), rejected a similar argument in *Town of Springfield v. State of Vermont Environmental Board, supra,* 521 F.Supp. at 246-47. In *Durfee,* the Court recognized that "the general rule of finality of jurisdictional determinations is not without exceptions. Doctrines of federal pre-emption or sovereign immunity may in some contexts be controlling." *Durfee,* 375 U.S. at 114, 84 S.Ct. at 246, *citing Kalb v. Feuerstein,* 308 U.S. 433, 60 S.Ct. 343, 84 L.Ed. 370 (1940), and *United States v. United States Fidelity Co.,* 309 U.S. 506, 60 S.Ct. 653, 84 L.Ed. 894 (1940).

The Town of Cavendish contends that Judge Coffrin's reliance upon *Durfee* was "mistaken" because in neither of the two cases cited by the Court was the issue of subject matter jurisdiction actually litigated in the first tribunal. Intervenor's Memorandum of Law on Defenses Exclusive of Merits of the Plaintiffs' Claim, dated July 15, 1982, at 7, *citing Durfee, supra,* 375 U.S. at 114 n. 12, 84 S.Ct. at 247 n. 12.

The footnote the Town of Cavendish cites does not support its argument. After noting that in neither *Kalb v. Feuerstein, supra,* nor *United States Fidelity, supra,* was the jurisdictional issue actually litigated, that footnote goes on to set forth a multifactor test for exceptions to the finality of jurisdictional determinations:

The Restatement of Conflict of Laws recognizes the possibility of such exceptions:

"Where a court has jurisdiction over the parties and determines that it has jurisdiction over the subject matter, the parties cannot collaterally attack the judgment on the ground that the court did not have jurisdiction over the subject matter, unless the policy underlying the doctrine of res judicata is outweighed by the policy against permitting the court to act beyond its jurisdiction. Among the factors appropriate to be considered in determining that collateral attack should be permitted are that

"(a) the lack of jurisdiction over the subject matter was clear;

"(b) the determination as to jurisdiction depended upon a question of law rather than fact;

"(c) the court was one of limited and not of general jurisdiction;

"(d) the question of jurisdiction was not actually litigated;

"(e) the policy against the court's acting beyond its jurisdiction is strong."

Durfee, supra, 375 U.S. at 114 n. 12, 84 S.Ct. at 247 n. 12, *citing* Restatement, Conflict of Laws [1st], §451(2) (Supp. 1948).

Even if the Public Service Board were a court, the application of this five-factor analysis to the case at hand would strongly indicate that the policy against permitting it to act beyond its jurisdiction outweighs the policy underlying the doctrine of *res judicata.* For the reasons given below, the Board's lack of jurisdiction is clear. The juris-

dictional determination hinged entirely on a question of law, since it is undisputed that the Black River is a navigable river. The Board is certainly not a court of general jurisdiction. And the policy of federal preemption here is strong. The only factor militating in favor of deference to the Board's ruling is that the question of jurisdiction was actually litigated. Here, this is not enough.[5]

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[5] The Town of Cavendish cites the recent case of *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinea* — U.S. —, — n. 9, 102 S.Ct. 2099, 2104 n.9, 72 L.Ed.2d 492 (1982), for the proposition that

> [a] party that has had an opportunity to litigate the question of subject matter jurisdiction may not, however, reopen that question in a collateral attack upon an adverse judgment. It has long been the rule that principles of *res judicata* apply to jurisdictional determinations — both subject matter and personal. See *Chicot County Drainage Dist. v. Bank*, 308 U.S. 371 [60 S.Ct. 317, 84 L.Ed. 329] (1940); *Stoll v. Gottlieb*, 305 U.S. 165 [59 S.Ct. 134, 83 L.Ed. 104] (1938).

Insurance Corp. of Ireland held that it did not violate due process to subject a foreign corporation to *in personam* jurisdiction as a sanction for failure to cooperate in discovery of facts relating to personal jurisdiction. The Court's statement quoted above is not inconsistent with the holding here. The principles of *res judicata* apply to jurisdictional determinations, but those principles include certain exceptions. On the very same day a unanimous Supreme Court held that "[t]he [federal district] court has the authority to pass upon its own jurisdiction and its decree sustaining jurisdiction against attack, while open to direct review, is *res judicata* in collateral action," *Chicot County Drainage Dist., supra*, 308 U.S. 371, 377, 60 S.Ct. 317, 320, 84 L.Ed. 329 (1940) (citing *Stoll v. Gottlieb, supra*), that same unanimous Court held that, while "[i]t is generally true that a judgment by a court of competent jurisdiction bears a presumption of regularity and is not thereafter subject to collateral attack [citing, *inter alia*, *Chicot County Drainage Dist., supra*, and *Stoll v. Gottlieb, supra*]," nonetheless, "Congress, because its power over the subject of bankrupt-

Moreover, the Public Service Board is not a court of limited jurisdiction. It is an administrative agency, albeit one with some quasi-judicial functions.[6] As Judge Coffrin noted in *Town of Springfield v. State of Vermont Environmental Board*, supra, "finality rules are further relaxed for agency rulings." *Id.* at 247, *citing Grose v. Cohen*, 406 F.2d 823, 824 (4th Cir. 1969) ("*Res judicata* of administrative decisions is not encrusted with the rigid finality that characterizes the precept in judicial proceedings."). *Cf. United States v. California*, 403 F.Supp. 874, 900-01 (E.D.Cal. 1975), *aff'd*, 558 F.2d 1347 (9th Cir. 1977), *rev'd on other grounds*, 438 U.S. 645, 98 S.Ct. 2985, 57 L.Ed.2d 1018 (1978).

Where a state court exercises jurisdiction over a matter

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cy is plenary, may by specific bankruptcy legislation create an exception to that principle and render judicial acts taken with respect to the person or property of a debtor whom the bankruptcy law protects nullities and vulnerable collaterally." *Kalb v. Feuerstein*, *supra*, 308 U.S. at 438-39, 60 S.Ct. at 345 (1940) (footnotes omitted). Similar federal preemption concerns dictate that the administrative ruling challenged here not be given conclusive *res judicata* value.

6 *See McFeeters v. Parker*, 113 Vt. 139, 143, 30 A.2d 300 (1943):

> The public service commission is to be classed as an agency of the Legislature, and is not a court in the strict sense. *Trybulski v. Bellows Falls Hydro-Elec. Co.*, 112 Vt. 1, 7, 8, 20 A.2d 117, 120. As there said, omitting citations. "The public service commission is an administrative body, clothed in some respects with *quasi* judicial functions, authorized in the exercise of the police power to make rules and regulations required by the public safety and convenience and to determine facts upon which existing laws shall operate, and having in a sense, auxiliary or subordinate legislative powers which have been delegated to it by the General Assembly."

See also Vermont Electric Power Co., Inc. v. Anderson, 121 Vt. 72, 84, 147 A.2d 875 (1959).

entrusted to exclusive federal jurisdiction, its judgment and any attempt to enforce the judgment may be "nullities subject to collateral attack." *Kalb v. Feuerstein, supra,* 308 U.S. 439, 60 S.Ct. at 346 (footnote omitted) (state court proceedings involving the estate of a petitioner in bankruptcy held null and void, whether or not the issue of jurisdiction was actually litigated in the state court, *id.* at 444, 60 S.Ct. at 348). When a state administrative agency takes jurisdiction over a matter committed to exclusive federal jurisdiction, its rulings are likewise subject to collateral attack. The Public Service Board order here challenged is not *res judicata.*

D. *The Anti-Injunction Act*

The Anti-Injunction Act, 28 U.S.C. §2283, provides:

> A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

Defendants contend this statute prohibits the court from granting declaratory relief voiding the already completed proceedings of a state administrative agency, the Public Service Board. While this initially implausible contention has somewhat more substance to it than might appear on first look, in the last analysis, it must be rejected.

That the statute does not in terms bar declaratory relief makes no difference. Ordinarily, the practical effect of injunctive and declaratory relief will be the same. *Samuels v. Mackell,* 401 U.S. 66, 73, 91 S.Ct. 764, 768, 27 L.Ed.2d 688 (1971). A court that issues a declaratory judgment has the power to enforce it through "[f]urther neces-

sary and proper relief," including an injunction. 28 U.S.C. §2202.

The defendants argue that the fact that the Public Service Board is an administrative agency does not make the Anti-Injunction Act inapplicable. They contend that the Board, in issuing the declaratory ruling here challenged, was "sitting as a court." Memorandum Supporting Defendant's Application for a Preliminary Determination on the Issues of Jurisdiction, dated June 18, 1982, at 10. Their argument proceeds by analogy from two related but distinct legal doctrines.

The first is the doctrine of administrative exhaustion announced in *Prentis v. Atlantic Coast Line, supra,* 211 U.S. 210, 29 S.Ct. 67, 53 L.Ed. 150. This doctrine requires would-be litigants in federal court seeking to challenge state administrative action to "make sure that the State in its final legislative action would not respect what they think their rights to be, before resorting to the courts of the United States." *Id.* at 230, 29 S.Ct. at 71. In *Prentis,* the Virginia State Corporation Commission set railroad rates, subject to review by the Virginia Supreme Court of Appeals. The Supreme Court, speaking through Justice Holmes, held that the Virginia Supreme Court of Appeals, in reviewing rates, was exercising a "legislative" rather than a judicial function. *Id.* at 227, 29 S.Ct. at 69. *Prentis,* thus, mandates a functional analysis as a part of the inquiry into whether further state administrative action is required before a federal court should take jurisdiction.

The second doctrine on which the defendants rely is the rule that the Anti-Injunction Act does not bar injunctions against the administrative actions of a state court. This doctrine was also first set forth in *Prentis:*

"Proceedings legislative in nature are not proceedings in a court within the meaning of [the Anti-Injunction Act], no matter what may be the general or dominant character of the body in which they may take place." *Id.* at 226, 29 S.Ct. at 69. Thus, where a state court exercises such nonjudicial powers as control over bar admissions, *Feldman v. Gardner*, 661 F.2d 1295 (D.C.Cir. 1981), *petition for cert. filed*, 50 U.S.L.W. 3769 (Feb. 23, 1982); *Harris v. Louisana State Supreme Court*, 334 F. Supp. 1289, 1299 (E.D.La. 1971); approving an Indian's conveyance of land, *Armstrong v. Maple Leaf Apartments, Ltd.*, 508 F.2d 518 (10th Cir. 1975); or declaring election returns, *Roudebush v. Hartke*, 405 U.S. 15, 21, 92 S.Ct. 804, 808, 31 L.Ed.2d 1 (1972), the Anti-Injunction Act does not apply.

The defendants urge that when a state administrative agency acts in a judicial capacity, the Anti-Injunction Act should preclude federal court interference. As the plaintiffs correctly point out, this was a question expressly pretermitted in *Prentis, supra*, 211 U.S. at 224-26, 29 S.Ct. at 68-9. In *Prentis*, the Court noted that the Virginia State Corporation Commission had the "power to enforce compliance with its order by adjudging and enforcing, by its own appropriate process, against the offending company the fines and penalties established by law." *Id.* at 225, 29 S.Ct. at 69 (emphasis added). The Court went on to "assume, without deciding, that, if it was proceeding against the appellees *to enforce the order and to punish them for a breach*, it then would be sitting as a court and would be protected from interference on the part of the courts of the United States." *Id.* at 226, 29 S.Ct. at 69 (emphasis added).

The court finds it unnecessary to address this assumption, expressly left undecided in *Prentis* and un-

decided since. *Cf. Gibson v. Berryhill*, 411 U.S. 564, 573 n. 12, 93 S.Ct. 1689, 1695 n. 12, 36 L.Ed.2d 488 (1973); *Delaware Coach Co. v. Public Service Commission*, 265 F.Supp. 648, 652 (D.Del. 1967). For the court concludes that, asuming the bar of the Anti-Injunction Act may prevent federal court interference against some quasi-judicial proceedings of state administrative agencies, unless those proceedings are *in rem* the state administrative agency must, at the least, have the power to enforce its own orders for the agency to be deemed a "court" within the meaning of the Act. "A judicial inquiry investigates, declares, *and enforces* liabilities as they stand on present or past facts and under laws supposed already to exist." *Prentis, supra*, 211 U.S. at 226, 29 S.Ct. at 69 (emphasis added).[7] "The nature of the final act determines the nature of the previous injury." *Id.* at 227, 29 S.Ct. at 69.

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[7] In *Prentis*, Chief Justice Fuller concurred in the result but dissented from the opinion. He would have held that the Virginia State Corporation Commission was a "court," and, consequently, the Anti-Injunction Act would bar the relief sought. In reaching this conclusion, he considered the following powers of the Corporation Commission important:

> It issued, executed *and enforced* its own writs and processes; it could issue *and enforce* writs of mandamus and injunction; it punished for contempt . . . *and its judgments, decrees and orders had the same force and effect as those of any other court of record in the State, and were enforced by its own proper processes. It was not subject to restraint by any other state court*, and from any and every ruling or decision by it an appeal lay to the Supreme Court of Appeals of the State . . . and pending the decision of such appeal the order appealed from *might* by a supersedeas be *suspended* in its operation . . .

Prentis, supra, at 233, 29 S.Ct. at 72 (opinion of Fuller, C.J., concurring in the judgment, disenting from the opinion) (emphasis added).

That the Vermont Public Service Board may have certain judicial powers, and may observe all the refinements of courtroom procedure, does not alter the fact that it lacks the power to enforce its own orders. By Vermont law, the Public Service Board must apply to the Vermont Supreme Court to enforce its orders. 30 V.S.A. §15. And although " '[o]rdinarily, when properly applied for, a mandate to enforce such order would issue almost as a matter of course.' " the Supreme Court will refuse to enforce the order if it represents an abuse of discretion or if the Board's powers were not exercised according to law or in a manner that injures property rights unjustly. *Mc Feeters v. Parker,* 113 Vt. 130, 144, 30 A.2d 300 (1943), *quoting from West Rutland v. Rutland Ry. Light and Power Co.,* 98 Vt. 508, 511, 129 A. 303 (1925).[8]

Defendants submit that the fact that the Public Service Board must apply to the Vermont Supreme Court for enforcement of its orders is irrelevant, since "[a] proceeding before the Vermont Supreme Court would clearly be a 'State court proceeding' within the purview of the Act." Defendant's Reply to Plaintiffs' Memorandum on the Issues of Jurisdiction Raised in Defendant's Application for a Preliminary Determination dated July 23, 1982, at 4. A unanimous Supreme Court rejected a similar argument, advanced in a case decided two years before *Prentis* and analogous to the instant case:

> It is also objected that an injunction will not lie from a United States court to stay proceedings in a state court, because of the provisions of [the Anti-Injunction Act.]. The [Mississippi Railroad] [C]ommission is, however, not a court, and is a mere admin-

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[8] *See* footnote 6, *supra.*

istrative agency of the State, as held by the Mississippi court.

> It is urged, however, that proceedings in a state court were commenced by the presentation of the petition of the citizens of Magnolia to the railroad commission, and because the commission, having made an order to stop the trains, would have to resort to the proper state court to aid it in the enforcement of its order, therefore the whole proceeding must be regarded as in a state court from the commencement. Whatever may be the provision of the state statute in regard to the state court of the order of the railroad commission, the proceeding while before the commission never thereby became a proceeding in a state court, and the jurisdiction of the Federal court to enjoin the commission from the enforcement of its order, because such order was a violation of the Federal Constitution, was not in the least affected.

Mississippi Railroad Commission v. Illinois Central Railroad Co., supra, 203 U.S. 335, 341, 27 S.Ct. 90, 93, 51 L.Ed. 209 (1906) (citations omitted) (Peckham, J., for a unanimous Court). *Cf. Hill v. Martin,* 296 U.S. 393, 402 and n. 14, 56 S.Ct. 278, 282 and n. 14, 80 L.Ed. 293 (1935).

Policy, as well as precedent, supports this interpretation of the Anti-Injunction Act. Where a state chooses to confer a part of its judicial business on an administrative agency and grants the agency the power to enforce its own orders, it makes that agency a part of the state's judicial apparatus. The same considerations of comity between parallel judicial systems that underlie the Anti-Injunction Act's bar against federal court interference with state court proceedings militate against interference with the agency's proceedings.

Where a state reserves to its courts the power to enforce an agency's orders, the state court system retains a certain power of oversight over the agency. As already mentioned, in Vermont, the state Supreme Court will not enforce an order of the Public Service Board that it concludes represents an abuse of discretion. *McFeeters v. Parker, supra,* 113 Vt. at 144-45, 30 A.2d 300. For the federal courts to share this power of oversight creates no unseemly intrusion into a parallel judicial system. This shared responsibility for oversight is but an incident of the concurrent obligation of state and federal courts to enforce state and federal law.

If aggrieved with a final state administrative order such as that at issue here, a party with a claim of federal right may pursue state remedies, or may elect to proceed at once to the courts of the United States to enjoin the enforcement of the order. *Bacon v. Rutland Railroad Co.,* 232 U.S. 134, 34 S.Ct. 283, 58 L.Ed. 538 (1914) (Holmes, J., for a unanimous Court) (held, party aggrieved by order of the predecessor of the Vermont Public Service Board could seek equitable relief in the United States District Court for the District of Vermont in lieu of an appeal to the Vermont Supreme Court). The choice of forum belongs to the plaintiff.

At least where the state has drawn a line between state court and state administrative agency by denying the latter the power to enforce its own orders, and if the state administrative agency is not exercising *in rem* jurisdiction, the Anti-Injuncton Act does not bar a federal court from enjoining enforcement of the state agency's order. Whether and under what circumstances the Anti-Injunction Act does prevent a federal court from issuing injunctive relief against a state administrative agency that possesses the power to enforce its orders is a question that need not be decided here.

Defendants seek to rely on *Prouty v. Citizens Utility Co.*, 257 F.2d 692 (2d Cir. 1958), *cert. denied*, 358 U.S. 867, 79 S.Ct. 98, 3 L.Ed.2d 99 (1958), a case they allege is "in all material respects, identical" to this case. *Prouty*, however, "rest[ed] on a principle of narrow compass," *id.*, 257 F.2d at 694:

> Necessary to the harmonious cooperation of federal and state tribunals is the well recognized rule that the court first assuming jurisdiction over property may maintain and exercise its jurisdiction to the exclusion of the other. The petition for condemnation was a proceeding *in rem*, where the state tribunal must control the property to give effect to its jurisdiction.

Id. (footnote omitted). Since in this case the Public Service Board has not exercised *in rem* jurisdiction, *Prouty* is inapposite to the Anti-Injunction Act issue here.

It is one matter to say that when a state court exercises administrative functions, the Anti-Injunction Act does not apply, *see Feldman v. Gardner, supra;* it is entirely another matter to conclude that an agency exercising certain quasi-judicial powers thereby is a "court" protected by that Act. The Public Service Board lacks the power of enforcement. It exercises narrow, "special and statutory powers not according to the common law, as to which nothing will be presumed in favor of its jurisdiction." *McFeeters v. Parker, supra*, 113 Vt. at 144, 30 A.2d 300. "The courts have power to prevent an abuse of discretion" by the Board, *id.*, and if circumstances justify equitable relief, "the court of chancery will afford a remedy." *Id.* at 145, 30 A.2d 300. Because the Public Service Board is an agency that lacks the power to enforce its order and was not exercising *in rem* jurisdiction in the ruling here collaterally attacked, the Anti-Injunction Act does not apply, and this court shares with the courts of

Vermont the power to restrain the Board's proceedings in an exclusively federal domain outside its proper jurisdiction.

E. *Principles of Equity, Comity, and Federalism*

Defendants request that this court abstain from deciding this case for reasons of equity, comity, and federalism. These principles are generally identified with *Younger v. Harris, supra,* and its progeny, but the doctrine of equitable restraint underlying the *Younger* decision has long been applied to both criminal and certain civil proceedings. *Douglas v. City of Jeannette,* 319 U.S. 157, 63 S.Ct. 877, 87 L.Ed. 1324 (1943); *cf. Huffman v. Pursue, Ltd.,* 420 U.S. 592, 603-05, 95 S.Ct. 1200, 1207-09, 43 L.Ed.2d 482 (1975). The Supreme Court has recently applied the *Younger* doctrine to preclude federal court interference with pending state enforcement actions in which important state interests in the efficient functioning of the state judicial system or other important state policies are at stake. *Middlesex County Ethics Committee v. Garden State Bar Association,* ____ U.S. ____, 102 S.Ct. 2515, 73 L.Ed.2d 116 (1982) (disciplinary proceedings against a lawyer brought by a state agency under the control of the state supreme court); *Moore v. Sims,* 442 U.S. 415, 99 S.Ct. 2371, 60 L.Ed.2d 994 (1979) (emergency custody litigation initiated by the State to protect children from parental abuse); *Trainor v. Hernandez,* 431 U.S. 434, 97 S.Ct. 1911, 52 L.Ed.2d 486 (1977) (attachment proceedings to recover money fraudulently obtained through state welfare programs); *Juidice v. Vail,* 430 U.S. 327, 97 S.Ct. 1211, 51 L.Ed.2d 376 (1977) (civil contempt proceedings essential to effectuate state court judgments); *Huffman v. Pursue, Ltd., supra,* 420 U.S. 592, 95 S.Ct. 1200, 43 L.Ed.2d 482 (1975) (public nuisance proceedings initiated by the State).

The proceeding before the Public Service Board was not a state enforcement proceeding, but, rather, was initiated by the Town of Cavendish. Cavendish sought to protect environmental, aesthetic, historical preservation, and economic values, and such other values as "the traditional attachment to home and hearth in Vermont." *See Petition of the Town of Cavendish*, P.S.B. Docket No. 4444, document submitted by Cavendish entitled Scope of Project, filed April 2, 1980, at 2. While these concerns are all important to Vermonters, it cannot escape comment that the Town of Cavendish balanced these values somewhat differently than did the Town of Springfield. Both appeared before the Board essentially as private parties. Both sought to influence the course of the Board's administrative actions. In short, because the proceeding before the Board was begun by a municipality to protect chiefly local interests, and the Vermont courts were not involved at any stage, the two principal reasons for *Younger v. Harris* abstention - deference to a State's effort to enforce important state policies, and respect for the integrity of the state judicial system, *cf. Huffman v. Pursue, Ltd., supra*, 420 U.S. at 608-09, 95 S.Ct. at 1210 — are present here in attenuated form.

To be sure, Cavendish's application to the Public Service Board resulted in the Board's taking jurisdiction over the Town of Springfield's hydroelectric project, and the court is certain that the Board, in exercising that jurisdiction, would desire to enforce policies of importance to the people of Vermont. But the customary deference to state enforcement efforts is suspended when, as in the instant case, the plaintiffs' challenge is that those efforts are preempted under the Supremacy Clause. As Judge Friendly has written, "abstention is peculiarly inappropriate when

the federal claim is that the state has been ousted from jurisdiction." *Chemical Specialties Manufacturers Association, Inc. v. Lowery*, 452 F.2d 431, 433 (1971). Although Judge Friendly was not referring specifically to *Younger v. Harris* abstention, his reasoning applies here in full force. "[W]here the only question is whether it is constitional to fasten the administrative procedure onto the litigant, the administrative agency may be defied and judicial relief sought as the only effective way of protecting the asserted constitutional right." *Public Utilities Commission v. United States, supra*, 355 U.S. at 540, 78 S.Ct. at 451. See *also Public Utilities Commission v. United Fuel Gas Co.*, 317 U.S. 456, 63 S.Ct. 369, 87 L.Ed. 396 (1943); *cf. People v. King*, 463 F.Supp. 749, 751 (D.Nev. 1979) (dictum) ("Thus, there is no question that King could have brought an action for declaratory relief against the State in this Court. And, there is no question that, had he done so under the Commerce Clause and preemption theories which he asserts here, this Court would have original jurisdiction over the matter and abstention would be inappropriate.").

In *Bacon v. Rutland Railroad Co., supra*, the Supreme Court unaminously rejected the argument of the Public Service Board's predecessor that until the complainant "had taken the appeal from the order [of the Public Service Commission] to the Supreme Court of the State that is provided by [the predecessor statutes to current 30 V.S.A. §§ 12, 14], it ought not to be heard to complain elsewhere." *Id.*, 232 U.S. at 136-37, 34 S.Ct. at 283. Justice Holmes, writing for the Court, repeated the teaching of *Prentis, supra*, that "at the judicial stage," the plaintiff "had a right to resort to the courts of the United States at once." *Bacon, supra*, at 137, 34 S.Ct. at 284. *Bacon v. Rutland Railroad*

Co. remains good law. *See Huffman v. Pursue, Ltd., supra,* 420 U.S. at 610 n. 21, 95 S.Ct. at 1211 n. 21. Accordingly, principles of equity, comity, and federalism do not preclude this court from proceeding to the merits of the plaintiffs' case, especially since plaintiffs' challenge to the Public Service Board's order is predicated on the Supremacy Clause and federal preemption.

II. THE MERITS

As the Public Service Board majority recognized in *Petition of the City of Winooski,* P.S.B. Docket No. 4606 (Jan. 14, 1982), a long line of cases has held that federal jurisdiction over the licensing of hydroelectric projects on navigable waters of the United States preempts state licensing authority. *Id.,* slip op. at 2-3, *citing, inter alia, First Iowa Hydro-Electric Cooperative v. Federal Power Commission,* 328 U.S. 152, 66 S.Ct. 906, 90 L.Ed. 1143 (1946); *Federal Power Commission v. Oregon,* 349 U.S. 435, 75 S.Ct. 832, 99 L.Ed. 1215 (1955); *Tacoma v. Taxpayers of Tacoma,* 357 U.S. 320, 78 S.Ct. 1209, 2 L.Ed.2d 1345 (1958); *Washington Dept. of Fish and Game v. Federal Power Commission,* 207 F.2d 391 (9th Cir. 1953), *cert. denied,* 347 U.S. 936, 74 S.Ct. 626, 98 L.Ed. 1087 (1954); *Town of Springfield v. State of Vermont Environmental Board, supra; Citizens Utilities Co. v. Prouty,* 122 Vt. 443, 176 A.2d 751 (1961), *cert. denied,* 369 U.S. 838, 82 S.Ct. 867, 7 L.Ed.2d 842 (1962); *In re Bellows Falls Hydro-Electric Corp.,* 114 Vt. 443, 47 A.2d 409 (1946). "All of this precedent notwithstanding," the majority wrote, "it appears to us that the United States Supreme Court, which is the ultimate authority on matters of federal preemption, has, by a recent decision, signaled its rejection of *First Iowa* and all of its progeny." *Petition of Winooski, supra,* slip op. at

3, *citing California v. United States*, 438 U.S. 645, 98 S.Ct. 2985, 57 L.Ed.2d 1018 (1978). In the declaratory ruling challenged in this case, *Petition of the Town of Cavendish, supra*, the Public Service Board found the issue "identical" to that in *Petition of Winooski*, and "adhere[d] to the views expressed in the majority opinion therein." *Petition of Cavendish, supra*, slip op. at 4.

The question for decision is thus whether the Supreme Court has in *California v. United States, supra*, implicitly overruled *First Iowa*. The short answer to this question is that it has not. Six weeks after the Public Service Board issued its ruling in *Petition of Winooski, supra*, and six weeks before it ruled in *Petition of Cavendish, supra*, a unanimous Supreme Court cited *First Iowa* with approval for the proposition that "New Hampshire's purported 'ownership' of the Connecticut River . . . provides no justification for restricting or conditioning the use of these federally-licensed [hydroelectric] units." *New England Power Co. v. New Hampshire*, 455 U.S. 331, . . . n. 6, 102 S.Ct. 1096, 110 n. 6, 71 L.Ed.2d 188 (1982).

In *California v. United States*, the Supreme Court dealt with a statute distinct in both purpose and history from that at issue in *First Iowa*. *First Iowa* had examined federal preemption of the licensing of hydroelectric projects, and construed §27 of the Federal Power Act, now codified at 16 U.S.C. §821. *California v. United States* explored state and federal authority over federal reclamation projects, and interpreted §8 of the Reclamation Act of 1902, codified at 43 U.S.C. §§372, 383. Notwithstanding some similarity in the wording of the statutes, they serve different objectives, and relate to federal actions fundamentally dissimilar in nature.

Section 27 of the Federal Power Act provides:

> Nothing contained in this chapter shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigaton or for muncipal or other uses, or any vested right acquired therein.

16 U.S.C. §821.

In *First Iowa*, the Supreme Court construed this statute as being "limited to laws as to the control, appropriation, use or distribution of water in irrigation or for municipal or other uses of the same nature." *Id.*, 328 U.S. at 175-76, 66 S.Ct. at 917. The Court rejected an interpretation of §27 that would have preserved concurrent state jurisdiction over the licensing of hydroelectric plants on navigable waters. *Id.* at 178-81, 66 S.Ct. at 918. It stressed that the Federal Power Act created an "integration" rather than a "duplication" of federal and state jurisdictions. *Id.* at 176, 66 S.Ct. at 917. Certain matters, such as irrigation, were left to the States to regulate, provided such regulation was not inconsistent with federal law. *Id.* at 174-75 and n. 19, 66 S.Ct. at 916 and n. 19. Other matters, such as hydroelectric plant licensing, were left exclusively to the Federal Government. Thus, "without setting up a divided authority over any one subject," both the States and the Federal Government were given a voice in the regulatory plan. *Id.* at 174, 66 S.Ct. at 916 (footnote omitted).

Concurrent jurisdiction over licensing was impermissible, the Court held:

> A dual final authority, with a duplicate system of state permits and federal licenses required for each project, would be unworkable. "Compliance with the require-

ments" of such a duplicated system would be impossible in some cases and probably difficult in most of them. *Id.* at 168, 66 S.Ct. at 913 (footnote omitted). Because "[t]he detailed provisions of the Act providing for the federal plan of regulation leave no room or need for conflicting state controls," concurrent state licensing up to the point of veto was condemned along with the clearly improper "veto power over the federal project" that the power to withhold a state permit implies. *Id.* at 181, 66 S.Ct. at 919 (footnote omitted), 164, 66 S.Ct. at 911. In the licensing stage, federal law covers the field.[9]

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[9] As Public Service Board member Bloomberg pointed out dissent in *Petition of Winooski*:

> A federal license is a comprehensive and detailed document. Directly or by reference to the parties' exhibits, it specifies the size, location and design of the dam, penstocks, powerhouse, generators and other equipment. It further specifies operating conditions, minimum releases, safety requirements, access routes and recreational facilities; and it mandates provisions for the protection of fish and other wildlife, historic sites and the natural environment generally. Moreover, the federal authorities maintain continuing jurisdiction over the project, and may alter the terms of the license or may revoke it if the project is not operated according to its requirements. Because the federal agency is charged with concern for the financial liability of the project, it must also be presumed that the various conditions imposed by the license constitute the maximum limits consistent with the project's economic health.
>
> There are therefore, virtually no conditions that a local authority could impose that would not be inconsistent with the terms of the federal license. At best, only the most trivial specifications could be required, a result which cannot justify the effort, expense and time required for the Board's review of major generating projects. It would be completely pointless for the Board to act with its powers thus restricted.

***Petition of Winooski**, supra*, dissenting opinion of Samuel S. Bloomberg, slip op. at 5-6.

Section 9(b) of the Federal Power Act, 16 U.S.C. §802(b), requires the applicant for a Federal Energy Regulatory Commission (FERC) license to submit "satisfactory evidence" of compliance with state laws relating to the use of water for power purposes. But this subsection "does not itself require compliance with any state laws." *First Iowa, supra,* 328 U.S. at 177, 66 S.Ct. at 918. It is merely a "suggestion to [FERC] of subjects as to which [it] may wish to have some proof submitted to it of the applicant's progress." *Id.* at 177-78, 66 S.Ct. at 918. FERC may wish to see proof of "the sufficiency of the legal title of the applicant to its riparian rights, or as to the validity of its local franchises, if any, relating to proposed intrastate public utility service." *Id.* at 178, 66 S.Ct. at 918. As Judge Coffrin noted in the *Environmental Board* case, "the import of [§ 9(b) and regulations implementing it] leaves no doubt that it is the function of FERC, to the exclusion of the [Environmental] Board and any other state agencies, to act on behalf of the people of Vermont, as well as all others, to ensure that the interests of all concerned are adequately protected." *Town of Springfield v. State of Vermont Environmental Board, supra,* 521 F.Supp. at 250.

In *California v. United States, supra,* the Supreme Court held that §8 of the Reclamation Act of 1902, 43 U.S.C. §383, requires the Secretary of Interior to comply with state water law, including any law requiring the obtaining of a state permit, in carrying out federal reclamation projects, unless the state law is clearly inconsistent with a Congressional directive. The statute at issue in the case provides:

> **Nothing in sections 372, 373, 381, 383, 391, 392, 411, 416, 419, 421, 432, 434, 439, 461, 491 and 498 of this title shall be construed as affecting or intended to affect**

> or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of such sections, shall proceed in conformity with such laws, and nothing in such sections shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof.

43 U.S.C. §383.

Justice Rehnquist's opinion for the Court begins with a detailed history of federal and state involvement in the reclamation of the arid lands of the Western States. The lessons of history were important to the Court because

> the situations invoking the application of [principles of comity and federalism] have contributed importantly to their formation. Just as it has been truly said that the life of the law is not logic but experience, see O. Holmes, The Common Law 1 (1881), so may it be said that the life of the law is not political philosophy but experience.

California v. United States, supra, 438 U.S. at 648, 98 S.Ct. at 2987. The federal experience in reclaiming the arid lands of the West has been that here is a need for uniformity in the regulation of water rights. Rather than create a uniform federal water law from scratch, or create a system of dual rights that would inevitably result in "legal confusion . . . if federal water law and state water law reigned side by side in the same locality," *id.* at 669, 98 S.Ct. at 2998. Congress elected to pursue uniformity by deferring to state regulation. *See id.* at 665-70, 98 S.Ct. at 2996-98. The Supreme

Court concluded from amply chronicled legislative history that, in impounding water to be used in a federal reclamation project, the Secretary of the Interior must comply with state water law, including the requirement of obtaining a state permit for appropriation of water, if needed, and satisfying any conditions attached to the permit which are not inconsistent with federal law. *Id.* at 647, 98 S.Ct. at 2987.

If there is one theme that runs through both *First Iowa and California v. United States*, it is that duplicative regulation is to be avoided. Both the States and the Federal Government have roles to play in regulating the use of our Nation's waters, but their roles are different. The States have been given primary jurisdiction over proprietary rights in water. Local regulation is appropriate because of the legal and geographical differences between the arid Western States, where the doctrine of prior appropriation generally prevails and water rights are subject to strict state regulation, and the Eastern States, where water rights are governed by the doctrine of riparian rights and an abundance of water obviates the need for complex state water distribution plans. On the other hand, the Federal Government has taken exclusive jurisdiction over the licensing of hydroelectric projects on navigable waters. It has established a specialized federal agency, the Federal Energy Regulatory Commission, which has the expertise to evaluate such projects in light of "comprehensive" criteria. *Cf.* 16 U.S.C. §803(a); *Town of Springfield v. State of Vermont Environmental Board, supra,* 521 F.Supp. at 249-50. That agency's control over the licensing of hydroelectric projects on navigable waters of the United States is plenary. The proper means by which the Public Service Board and the Town of Cavendish may make sure that their concerns are taken

into account in the construction of the hydroelectric plant the plaintiffs propose to build is to appear before the FERC as parties, as they have a right to do, *see* 18 C.F.R. §1.8, rather than to subject the plaintiffs to duplicative, and possibly conflicting, regulation.

In sum, *California v. United States* does not implicitly overrule *First Iowa*. The two cases are consistent. Both recognize the need for a uniform system of regulation in which the States perform certain functions and the Federal Government performs other functions. While the Vermont Public Service Board may eventually have jurisdiction over certain aspects of the Black River hydroelectric project, such as rate-setting, it is without jurisdiction over the licensing and approval of the project.

It is DECLARED and ADJUDGED that, under the Federal Power Act and the Supremacy Clause, the jurisdiction of the Federal Energy Regulatory Commission to act on the plaintiffs' application for a license to develop the proposed Black River hydroelectric project is exclusive of the jurisdiction assumed by the majority of the members of the Vermont Public Service Board over the improvements, works, facilities, features, and elements of the Black River project within the plaintiffs' application to FERC for a license for the project. Accordingly, the order entered by the Public Service Board on April 7, 1982, and filed on April 8, 1982, in *Petition of the Town of Cavendish*, P.S.B. Docket No. 4444, exceeds its jurisdiction, and is without legal force and effect. Since no disputed issue of fact is presented, the plaintiffs' motion for summary judgment is GRANTED.

It is so ORDERED.

STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 4444
Petition of the Town of Cavendish
for a Declaratory Ruling

Order Entered 4-8-82

INTRODUCTION

This is a declaratory ruling proceeding commenced on January 25, 1980 by the petitioner, the Town of Cavendish. Two other parties have appeared, the respondent, the Town of Springfield, and an intervenor, the Concerned Citizens of the Black River Valley.

The petition asks the Board to declare that a certain "hydro-electric project of the Town of Springfield, Vermont is subject to Section 248 of Title 30 V.S.A. and that the Town must obtain a Certificate of Public Good from the Public Service Board pursuant to said section of the law." The petition does not specifically identify the project, but in response to the petitioner's request, the respondent submitted on March 31, 1980 an exhibit giving a detailed description. At the hearing held on January 21, 1982, the Town's application to the Federal Energy Regulatory Commission for a license for the project was admitted as the Board's Exhibit No. 1 for the purpose of showing the location and scope of the project as well as to show the pendency of the action before F.E.R.C.

There are no disputed issues of fact in this case. The sole question for decision is whether the Board has jurisdiction under 30 V.S.A. §248 with respect to hydro-electric generating facilities which are proposed to be constructed

by the respondent on the Black River within the Towns of Cavendish, Springfield and Weathersfield and which are subject to the licensing authority of F.E.R.C. under the Federal Power Act, 16 U.S.C. §791a *et seq.*

DISCUSSION

We turn first to three ancillary issues raised by Springfield's Motion to Dismiss filed on January 20, 1982. The first of these is a claim that this action is premature because Springfield, not having yet received a federal license, is not able to commence site preparation or construction. That work on the project is not imminent does not seem to us to be material. One of the important reasons why declaratory ruling procedures have been established in this state and elsewhere is so that parties can ascertain their rights and responsibilities in advance of the time when they must undertake a course of action. See 12 V.S.A. §4722; *Robtoy v. City of St. Albans,* 132 Vt. 503, 321 A.2d 451 (1974). By making an application to the Federal Energy Regulatory Commission for a federal license, Springfield has set in motion a course of events which likely will lead (if the license is granted) to construction within the reasonably forseeable future. The controversy, therefore, is neither abstract nor hypothetical; and we think it is appropriate for a decision to be rendered now.

What has been said immediately above should be sufficient to answer Springfield's second contention, that is, that there is no present controversy for which declaratory relief is appropriate.

Finally, Springfield raises a question as to whether it is a company within the meaning of 30 V.S.A. §201, asserting that if it is not, it need not obtain a certificate of public good under Section 248, which provides that "No *company*

as defined in Section 201 . . . may begin site preparation for or construction of an electric generating facility within the state . . . unless the . . . board . . . [issues a certificate of public good]." (Emphasis added.) Section 201, in turn, defines companies to include municipalities "owning or conducting any public service business or property use in connection therewith. . . ." While Section 248 may have been somewhat inartfully drafted in respect to this question, we think there is no doubt that it applies here. If Springfield's argument is correct, then even an existing and operating utility could avoid compliance with Section 248 simply "by establishing a subsidiary company to construct its generating and transmission facilities. Since the purpose of the statute is both to assure that such facilities are not needlessly constructed and to assure that environmental goals are not violated, this interpretation would render the statute a total nullity. It is obviously contrary to the intent of the statute.

Moreover, at the very instant that site preparation commences, the entity responsible for the same begins operation of "public utility business" and/or comes into ownership of "property used in connection therewith." The statute thus comes into effect at that moment at the latest, and without a certificate of public good in hand, the company would be in violation.

As to the merits of this case, we are presented with the identical issue decided in Docket No. 4606, Petition of the City of Winooski. We adhere to the views expressed in the majority opinion therein and therefore answer this petition in the affirmative.

ORDER

IT IS HEREBY ORDERED, ADJUDGED AND DECREED by the Public Service Board of the State of Vermont that:

1. The hydro-electric project proposed to be built by the respondent, Town of Springfield, and described in Board Exhibit No. 1 is subject to the Board's jurisdiction under 30 V.S.A. §248; and

2. The respondent shall not begin site preparation for or construction of the same until it shall have obtained a certificate of public good from this Board.

Dated at Montpelier, Vermont this 7th day of April, 1982.

s/ V. Louise McCarren
s/ Rosalyn L. Hunneman
PUBLIC SERVICE BOARD
OF VERMONT

OFFICE OF THE CLERK
FILED: April 3, 1982
ATTEST: s/ Susan M. Hudson
Clerk of the Board

STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 4444
Petition of the Town of Cavendish
for a Declaratory Ruling

Opinion Entered: 4-8-82

DISSENTING OPINION

I adhere to the views expressed in my dissenting opinion in Docket No. 4606, and I therefore dissent from the Board's decision in this matter.

Dated at Montpelier, Vermont this 6th day of April, 1982.

s/ Samuel S. Bloomberg
Samuel S. Bloomberg, Board Member

OFFICE OF THE CLERK
FILED: April 8, 1982
ATTEST: s/ Susan M. Hudson
Clerk of the Board

STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 4606
Petition of City of Winooski
for Declaratory Ruling

Hearing at
Burlington, Vermont
October 29, 1981
Opinion Entered: 1-14-82

PRESENT: V. Louise McCarren, Chairman

APPEARANCES: Joseph E. McNeil, Esq.
McNeil, Murray & Sorrell, Inc.
for the Respondent
William E. Wargo, Esq.
for the Petitioner
Michael L. Burak, Esq.
Peter H. Zamore, Esq.
for the Department of Public Service

OPINION

I

The issue in this case is whether the Board has the power, under 30 V.S.A. §248, to review and to issue a certificate of public good for a hydroelectric project which is also subject to the licensing authority of the Federal Energy Regulatory Commission pursuant to the provisions of the Federal Power Act, 16 U.S.C. §791a *et seq.* (1974). The issue is raised by the City of Winooski, which has brought a petition for a declaratory ruling with respect to the Chase Mill project proposed to be developed by the City

of Burlington on the Winooski River. There is no genuine issue as to any material fact; Winooski and Burlington agree that, unless federal authority is exclusive, the project is subject to the Board's jurisdiction under section 248.

II

A substantial number of cases have held that federal licensing authority over hydroelectric projects excludes any similar state authority. The earliest of these, and the one upon which all the others rest, is *First Iowa Hydro-Electric Cooperative v. F.P.C.*, 328 U.S. 152, 66 S.Ct. 906, 90 L.Ed. 1143 (1946). According to the Supreme Court's opinion in that case, when a project is within the jurisdiction of the F.P.C., no aspect thereof which the Federal Power Act commits to the discretion of federal authorities may be made subject to state control. While the Federal Power Act expressly "saves" state laws relating to property rights in water, state permit or certificate procedures — which give state authorities a veto power over projects and thus have the potential to destroy the effectiveness of the federal legislation — are wholly superceded. 328 U.S. at 164-165, 90 L.Ed. at 1150-51. Accord, *F.P.C. v. Oregon*, 349 U.S. 435, 75 S.Ct. 832, 99 L.Ed. 1212 (1955); *Public Utils Dist. No. 1 v. F.P.C.*, 308 F.2d 312 (D.C. Cir. 1962), *cert. denied*, 372 U.S. 908, 83 S.Ct. 719, 9 L.Ed. 2d 719 (1963); *Washington Dept. of Fish and Game v. F.P.C.*, 207 F.2d 381 (9th Cir. 1953), *cert. denied*, 347 U.S. 936, 74 S.Ct. 626, 98 L.Ed. 1087 (1954); *Iowa v. F.P.C.*, 178 F.2d 421 (8th Cir. 1949), *cert. denied*, 339 U.S. 979, 94 L.Ed. 1383 (1950); *cf., Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 78 S.Ct. 1209, 2 L.Ed. 2d 1345 (1958); *Springfield v. Vermont Environmental Bd.*, No. Civ. 81-62 (D. Vt., Aug. 21, 1981).

In addition to these federal cases, there are two Ver-

mont decisions on the same issue. In each, the Supreme Court held that the Public Service Board's regulatory authority over hydroelectric projects subject to federal jurisdiction is preempted. *Citizens Utils Co. v. Prouty,* 122 Vt. 443, 176 A.2d 151 (1961), *cert. denied,* 396 U.S. 838, 82 S.Ct. 867, 7 L.Ed. 842 (1962); *In re Bellows Falls Hydro-Elec. Corp.,* 114 Vt. 443, 47 A.2d 405 (1946).

All of this precedent notwithstanding, it appears to us that the United States Supreme Court, which is the ultimate authority on matters of federal preemption, has, by a recent decision, signaled its rejection of *First Iowa* and all of its progeny. In that case, *California v. United States,* 438 U.S. 645, 98 S.Ct. 2985, 57 L.Ed. 2d 1018 (1978), the issue was the degree of control a state could lawfully exercise over a federal reclamation project undertaken pursuant to the Reclamation Act of 1902, 43 U.S.C. 371 *et seq.* (1964). In particular, the state of California asserted that the federal government could be required to adhere to various state mandated conditions concerning the use of water to be impounded by the project. California claimed such authority by virtue of section 8 of the Reclamation Act which provides that "Nothing in this Act shall be construed as affecting or intending to affect or in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder . . . ." The Court held that section 8 authorized California to impose any condition respecting the control, appropriation or use or distribution of water so long as no condition was inconsistent with congressional provisions authorizing the project. 438 U.S. at 674-75, 57 L.Ed. 2d at 1038.

In *California,* the federal government had evidently argued that section 8 dealt only with proprietary rights in

water and that the federal official responsible for the reclamation project was required to comply with state law only when it should become necessary to purchase or condemn vested water rights. (*Ibid.*). This is precisely the interpretation which the Supreme Court had given in *First Iowa* to section 27 of the Federal Power Act, a section virtually identical to section 8 of the Reclamation Act. While the Court's opinion in *California* is careful to avoid an express acknowledgement of it, earlier cases had construed section 8 of the Reclamation Act in the very same way as *First Iowa* had interpreted section 28 of the Power Act. If the Supreme Court was willing, as it obviously was in California, to give a new meaning to section 8, then it must be prepared to do the same to section 27. That the two sections could have radically different meanings despite their practically identical wording is incomprehensible.

Indeed, the Court's opinion in *First Iowa*, itself, confirms this view. There, in footnote 20, the Court discusses both statutes. It asserts that the language in the Reclamation Act (which was enacted a number of years prior to the Federal Power Act) was limited in its application to laws relating to proprietary rights in water. Therefore, it reasons, the same meaning must have been intended when Congress enacted section 27 of the Power Act: "The use, in Section 27 of the Federal Power Act, of language having a limited meaning in relation to proprietary rights under the Reclamation law . . . carries that established meaning of the language into the Federal Power Act in the absence of anything in the Act calling for a different interpretation of the language." 328 U.S. at 176, 90 L.Ed. 1156 (footnote 20). Thus, in *First Iowa* the Court relied upon its understanding of the meaning of section 8 of the Reclamation Act in order to interpret section 27 of the Power Act. But in *California*,

the Court gave an entirely new interpretation to section 8. It therefore follows that there must be a new meaning to section 27.

The decisions of the Vermont Supreme Court in the *Bellows Falls* and *Citizens Utilities* cases in no way detract from this analysis. Those holdings were not based upon any deficiencies in the extent to which Vermont's statute attempts to assert jurisdiction. They are based firmly upon *First Iowa*. If *First Iowa* has fallen, there is no question that 30 V.S.A. §248 applies to federally licensed projects.

The United States District Court's decision in the *Springfield* case, *supra*, has no bearing, in our opinion, on this case. The Court may have had the Public Service Board in mind when it stated that it is FERC's function "to the exclusion of . . . [all] state agencies" to act on behalf of the people of Vermont. That part of the Court's opinion is clearly dicta, however, since the question before it concerned only the Environmental Board. Moreover, the Court distinguished *California*, and we think properly in this context, by pointing out that the subject matter of the *Springfield* decision — the Environmental Board's control over recreational facilities and the relocation of a highway — has nothing to do with the subject of state laws — control over the use of water — saved from preemption by section 27 of the Power Act and section 8 of the Reclamation Act.

For the foregoing reasons, we conclude that this Board has the power, despite the licensing authority of the federal government, to subject in-state hydro-electric projects to review under 30 V.S.A. §248. *California* clearly tells us that section 27 of the Federal Power Act requires deference "to the substance, as well as the form, of state water law," 438 U.S. at 675, 57 L.Ed.2d at 1038, to the same extent as does

section 8 of the Reclamation Act. Part of the substance of Vermont's water law is that water in the rivers of the state cannot be used for hydro-electric generation except upon the issuance of a certificate of public good by the Public Service Board issued after hearing in conformance with section 248.

III

We believe that the result compelled by *California* is a sound one not only in law, but from the standpoint of public policy as well. For in our view, proper resolution of the vital issues raised by hydroelectric development can only be achieved at the local level. The delicate balance that must be struck between competing priorities will never be made, unless by blind chance, by agencies which are unfamiliar with local conditions. Whatever may be its technical expertise, the Commission sitting in Washington, overburdened by cases whose magnitude often dwarfs any development on one of Vermont's modest rivers, simply cannot achieve an appreciation of how Vermonters perceive the relationship between the requirements of our utilities, the environmental concerns of the state as a whole and the needs, capabilities and values of the small communities most affected by a project of this nature. Absent such an appreciation, it is exceedingly difficult for decisions to be made in a rational way. We cannot claim that this Board is infallible, but we firmly believe that the legitimate and long term interests of all Vermonters can only be protected by reliance upon our own institutions.

It may be that from the point of view of an agency of the federal government, the things which concern us are overly provincial. Yet these things are, in truth, bound up in the enduring values that make possible the unique quality

of life that still persists in our state. If that quality is to be preserved, it will only be through the efforts of our own citizens, most of whom share a profound respect for the natural environment. That respect has been translated into significant, long term accomplishments by both governmental and private instrumentalities. It has made our state a leader in environmental protection. The result is plain for all to see in Vermont's unsurpassed beauty. It is a result which, in the nature of things, is not likely to be achieved by the action of government officials remote from our land and not answerable to our people.

The petition is answered in the affirmative.

Dated at Montpelier, Vermont this 14th day of January, 1982.

s/V. Louise McCarren
s/Rosalyn L. Hunneman
PUBLIC SERVICE
BOARD
OF VERMONT

OFFICE OF THE CLERK
FILED: January 14, 1982
ATTEST: s/Susan M. Hudson
Clerk of the Board

STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 4606
Petition of City of Winooski
for Declaratory Ruling

Hearing at
Burlington, Vermont
October 29, 1981
Opinion Entered. 1-14-82

DISSENTING OPINION

I agree with the majority, for all of the reasons they have stated so eloquently, that Title 30 V.S.A. §248 should afford jurisdiction to the Board over projects of this nature. Moreover, because of the modest interstate impact of Vermont's hydroelectric developments, practical justification for concomitant federal jurisdiction, let alone exclusive jurisdiction, rests upon spurious grounds. Nonetheless, the application of federal jurisdiction has been established as a legal reality. Nor can I extract from *California v. United States* or from other federal cases a sufficient reason to hold that federal regulatory authority is not preemptive.

The majority's argument seeks legitimacy by finding an analogy between the provisions of two statutes which have very different purposes and very different histories. As one of our most brilliant jurists and legal philosphers long ago observed, "The life of the law has not been logic: it has been experience." O. W. Holmes, The Common Law, at 1 (1881). In my view experience is the telling factor in this case.

The difficulty in reliance by the majority upon *California v. United States* as a determinant in this matter is

that while the language of the two statutory provisions is indeed similar, section 27 of the Power Act has long had a clear and authoritative construction that precludes the kind of interpretation given to section 8 of the Reclamation Act. The construction of section 27 of the Power Act was originally given in *First Iowa*, and was central to that decision. After reviewing the statute's legislative history, the Court held that the reference in section 27 to laws relating to "control, appropriation, use or distribution of water" was limited to laws relating to proprietary rights in water. 328 U.S. at 175-176, 90 L.Ed. at 1155-56.

This interpretation of section 27 has stood since 1946, altered neither by Congress nor by the Supreme Court. Thirty-five years of administrative practice and virtually all hydro-electric development in this country since that time have been based upon it. Much of that development might have been impossible without such an interpretation, and the principal goal of the Federal Power Act well might have been frustrated. However much we believe it appropriate for local authorities to have jurisdiction over essentially intrastate projects, such as the project now at issue, the law in this area is simply too firmly settled.

The treatment which courts have accorded to the Federal Power Act is consistent with experience and practicality. There are vast differencs between a reclamation project and a power project. Those differences clearly justify quite different models in the relationship between federal and state authority. A reclamation project alters the character of the river or rivers upon which it is based. It alters the economy, demography and ecology of the region. By reason of the specific regional impact of a reclamation project, it is certainly appropriate to defer to local law and policy. This conclusion would follow even in a case where

the dam is located in one state and the reclamation area in another, for principles of comity and equity surely warrant consideration to the laws of the state whose valuable resource is to be so directly affected.

But no such statement can be made regarding hydro-electric development, and the reason lies primarily in the character of such development. Many hydro projects, especially the large ones which were foremost in mind when the Federal Power Act was enacted, may have little local effect beyond the river itself. Even of the electricity produced, often but a portion will be consumed in the immediate vicinity. The vast bulk of the generation may be transmitted to other regions, often at great distances. Although a large scale hydro project would appear to be an inapt comparision with the instant Springfield project, yet it is still germane: we are dealing with national legislation and must construe it in its national context.

Moreover, the licensing provisions of the Federal Power Act were enacted not primarily as a spur to local development as was the Reclamation Act, but rather to advance national goals. The principal goal of providing for the expanded development of hydro power was to conserve the nation's coal and oil resources. Legislative History of the Federal Power Act, Part I, Vo. II, K1042 F9112 (1962). With the present need to decrease our reliance on imported petroleum, hydro-electric development is more than ever a national concern.

In *California*, the Supreme Court obviously concluded that Congress had been concerned about the protection of local interests in reclamation projects. But important differences between the operation of the Reclamation Act and of the Power Act show that Congress made other provisions for the protection of local interests where hydro projects are

concerned. In a federal reclamation project, there is a notable lack of administrative control. Upon the approval of the President, 43 U.S.C. §413, and appropriation by Congress, 43 U.S.C. §414, the government may proceed with the project unrestrained except by the limits of statutory authority and, as the Court has held in *California,* by local water law. Under the Federal Power Act, in contrast, there is a formal administrative procedure which is subject to appeal and in which decisions can be made on the basis of a properly developed record. State and local authorities may be parties to the proceedings. Important protections are thus afforded which are wholly absent from reclamation projects.

The foregoing considerations aside, *California* held only that state law governed the appropriation and use of water (in reclamation projects) to the extent that it is not inconsistent with Congressional "provisions", 438 U.S. at 674, 57 L.Ed. 2d at 1038, or "directives", 438 U.S. at 678, 57 L.Ed. 2d at 1040. Should the same view be taken of section 27 of the Federal Power Act, it would mean that in Vermont water could not be used for a hydro-electric project unless the Public Service Board first determined, among other things, that such use would be required to find that the project was needed to meet demand and that it would not have an undue adverse affect on esthetics, water purity or the natural environment. See 30 V.S.A. §248. Finally, a further qualification must be added that any condition imposed by the Board, to assure compliance with section 248 criteria, could not be inconsistent with the terms of the federal license.

That qualification would assure that any review under section 248 would be virtually meaningless. A federal license is a comprehensive and detailed document. Directly or by

reference to the parties' exhibits, it specifies the size, location and design of the dam, penstocks, powerhouse, generators and other equipment. It further specifies operating conditions, minimum releases, safety requirements, access routes and recreational facilities; and it mandates provisions for the protection of fish and other wildlife, historic sites and the natural environment generally. Moreover, the federal authorities maintain continuing jurisdiction over the project, and may alter the terms of the license or may revoke it if the project is not operated according to its requirements. Because the federal agency is charged with a concern for the financial liability of the project, it must also be presumed that the various conditions imposed by the license constitute the maximum limits consistent with the project's economic health.

There are therefore, virtually no conditions that a local authority could impose that would not be inconsistent with the terms of the federal license. At best, only the most trivial specifications could be required, a result which cannot justify the effort, expense and time required for the Board's review of major generating projects. It would be completely pointless for the Board to act with its powers thus restricted.

I certainly believe that this Board should not decline lightly to exercise jurisdiction which is expressly conferred by Vermont statutes. But when the Supreme Court of the United States as well as our own Supreme Court, have clearly ruled that superior legislative authority has removed that jurisdiction, we are bound to adhere to those rulings. It is not the province of an administrative tribunal to overrule the holdings of the highest courts of the state and of the nation, on a predication that is little more than a spec-

ulation that a newly composed Supreme Court might take a new view of the matter.

I would answer this petition in the negative, and I respectfully dissent from the decision rendered by the majority.

Dated at Montpelier, Vermont this 14th day of January, 1982.

s/Samuel S. Bloomberg,
Samuel S. Bloomberg, Board Member

OFFICE OF THE CLERK
FILED: January 14, 1982
ATTEST: s/Susan M. Hudson
CLERK OF THE BOARD